Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

MARY RUTH McCARTHY, GUY COVILLE,
EDWARD ORMSBY, CARMEN TOMASETT
and JOSEPH HOFFMAN,
PETITIONERS,

vs.

RECORDEX SERVICES, INC., COPYRIGHT, INC.
SMART CORP., MEDFAX, INCORPORATED
HOSPITAL CORRESPONDENCE, COPIERS, INC.
MERCY HEALTH CORPORATION OF
SOUTHEASTERN PENNSYLVANIA
MISERICORDIA HOSPITAL DIVISION
METHODIST HOSPITAL, THE GRADUATE HOSPITAL
HAHNEMANN UNIVERSITY HOSPITAL and
THE LOWER BUCKS HOSPITAL
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should Illinois Brick's "direct purchaser" be applied to deny Plaintiffs standing to seek antitrust damages resulting from a price fixing scheme, because their attorneys, while acting as their agents, temporarily advanced funds to make the challenged purchases under circumstances fitting Utilicorp's suggestion that ". . .we might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffers no injury"?

2. Where Plaintiffs fit Utilicorp.'s suggested hypothetical, does rigid adherence to Illinois Brick's "direct purchaser" rule, result in persons who sustained all damages being declared "indirect purchasers" having no standing to sue; persons who sustained no damages being declared "direct purchasers" with standing to sue; and in consequence thereof a price fixing scheme in violation of the antitrust laws might go unremedied?

3. Should state law or a uniform federal common law rule decide questions of agency where a determination of that issue is required to decide if it is the agent or principal who has standing as a "direct purchaser" to seek damages under federal antitrust law?

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ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Based upon the Disclosure of Corporate Affiliations and Financial Interest forms, filed by Defendant/Appellees in the court below, there are no parent or non-wholly owned subsidiaries to be listed on behalf of Defendants/Respondents.

THE BASIS FOR JURISDICTION IN THIS COURT

(i) The Judgment and Order sought to be reviewed was entered on April 4, 1996. **(Appendix at 1a-35a.)**

(ii) On April 30, 1996, the United States Court of Appeals for the Third Circuit denied a Petition for Rehearing and Rehearing Before the Court En Banc filed with it by Petitioners herein. **(Appendix at 36a, 37a.)**

(iii) Pursuant to Title 28 U.S.C.A. § 1254, this court has jurisdiction to review by Writ of Certiorari the Judgment or Order in question.

THE CONSTITIONAL PROVISIONS, TREATIES STATUTES , ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

1. The Act of October 15, 1994, § 4; 15 U.S.C.A. § 15.

2. 28 Pa. Code § § 115.27, 115.28, 115.29.

The provisions cited above are set out verbatim in the Appendix to this Petition. **(Appendix at 52a-55a.)**

STATEMENT OF THE CASE

Facts Material to Consideration of the Question Presented

1. Procedural History

Five (5) Plaintiffs filed a three-count Complaint in the United States District Court for the Eastern District of Pennsylvania, seeking an injunction, money damages and Class Certification, against five (5) Hospital Defendants, and five (5) Copy Service Defendants. The Complaint asserted violations of the antitrust laws (Count I); violations of the RICO statute (Count II); and violations of the civil rights law (Count III). **(Civil Action - Complaint at 016-048)**.

The basis for federal jurisdiction in the United States District Court was Title 28 U.S.C.A.§ 1331; 15 U.S.C.A. § 15; and 18 U.S.C.A. § 1964.

Thereafter, Plaintiffs filed an Amended Complaint, amplifying the Class Action allegations to which Defendants filed a Motion to Dismiss pursuant to F.R.C.P. Rule 12(b)(6). That motion was denied by the District Court in an Order dated August 5, 1993. **(Amended Complaint, 049-86; Order dated August 5, 1993; 0246).**[1]

On April 3, 1994, Defendant Hahnemann filed a Motion for Partial Summary Judgment on the antitrust claim, which was initially denied by the court in an order dated May 5, 1994. **(Order dated May 5, 1994, 589).**

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[1]After the Motion to Dismiss was filed, Plaintiffs agreed Count III of their Amended Complaint asserting Civil Rights violations should be dismissed. After the court overruled that Motion each Defendant filed an Answer to Plaintiffs' Amended Complaint. **(Motion to Dismiss, 087-245; Answers to Plaintiffs' Amended Complaint, 247-403).**

On July 8, 1994, the Court reconsidered this Motion and granted partial summary judgment, dismissing the antitrust claims in Count I of the Amended Complaint. **(Appendix at 40a-42a.)**[2]

On November 18, 1994, the Court issued a Memorandum and Order denying Plaintiffs' previously filed Motion for Class Certification. **(Appendix at 43a-47a.)**

On December 29, 1994, the Court issued a Memorandum and Order granting summary judgment to all Defendants on Count II of Plaintiffs' Amended Complaint, asserting RICO violations, and entering final judgment in favor of all Defendants and against all Plaintiffs on all claims asserted in the Amended Complaint. **(Appendix at 48a-51a.)**

On January 3, 1995, Plaintiffs filed a Notice of Appeal from the final Order of December 29, 1994, dismissing all claims and granting summary judgment on the RICO claim; and the Court's previously interlocutory orders granting summary judgment on the antitrust claim and refusing to certify the case as a class action.

On April 4, 1996, a three-judge panel of the United States Court of Appeals for the Third Circuit, affirmed the Order of the lower court granting summary judgment on the damage claims under the antitrust and RICO statutes, and reversed that portion of the Order granting summary judgment on Plaintiffs' claim for injunctive relief under the antitrust statute. **McCarthy v. Recordex Services, Inc., 80 F.3d 842 (3d Cir. 1996)\(Appendix 1a-35a .)**

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[2]Defendant Hahnemann filed a Motion for Reconsideration of the Order initially denying its Motion for Partial Summary Judgment. All other Defendants joined in the Motion which was based upon a common question applicable to all Plaintiffs and Defendants. **(590-606)**.

Judge Stapleton filed a Dissenting Opinion in which he concluded Plaintiffs were entitled to proceed on their claims for damages under the antitrust and RICO statutes. He concurred in the majority's decision to remand the matter back to the District Court with respect to the claim for injunctive relief.

On April 30, 1996, the court denied Plaintiffs' Motion for Rehearing and Rehearing In Banc. Three (3) judges would have granted rehearing in banc. **(Appendix at 36a-37a.)**

The lower court in granting summary judgment and appellate majority in upholding this summary judgment, each relied on the same core rationale; that Plaintiffs lacked standing because the attorneys who represented them, and not Plaintiffs, were the "direct purchasers" of the Plaintiffs' hospital records, within the meaning of the decision of this court in Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061 (1977).

2. Statement of Facts

Plaintiffs were former patients of hospitals in Pennsylvania who contend they were charged grossly excessive fees to obtain copies of their hospital records; or who refused to pay the excessive fees demanded, and were unable to obtain copies of their hospital records from the hospitals in which they were patients. **(Plaintiffs' Amended Complaint at 050, 051, 065, 066 - ¶¶ 1-5, 51-55).**

They contend Defendants violated the antitrust laws by conspiring to use a monopolistic control over patient hospital records for the purpose of fixing fees for copying those records at the request of patients or their agents, which were grossly exorbitant, and vastly in excess of the fees they would have to pay for those records if they were being purchased in a free, open and competitive market environment. **(Plaintiffs' Amended Complaint at 065, 073-076 - ¶¶ 54, 74-83).**

Pennsylvania regulations give hospitals exclusive ownership of patient hospital records; of necessity a monopolistic control over them; and couple that ownership with a correlative fiduciary responsibility to provide to patients or their designees copies of those records at a cost reasonably related to the cost c `copying the records. It is asserted that Defendants have, instead, conspired to illegally profit from that monopoly. **(Plaintiffs' Amended Complaint at 075 - ¶ 80).**

The Pennsylvania Department of Health pursuant to authority granted to it under the Health Care Facilities Act (35 P.S. §§ 448.101-448.904), has enacted regulations governing the operation of hospital medical records departments.

Included among these regulations are: a provision establishing patient hospital records as confidential and requiring the written authorization of the patient before medical information about the patient can be released outside the hospital ***(28 Pa. Code § 115.27);*** a provision designating hospital records as the property of the hospital ***(28 Pa. Code § 115.28);*** and a provision establishing a system to allow patients or their designees to obtain from the hospital copies of their medical records ". . .for the cost of reproducing copies [which] . . .shall be reasonably related to the cost of making the copy." **(28 PA.Code § 115.29).** This regulation states:

> ***"§ 115.29. Patient access.***
> Patients or patient designees shall be given access to or a copy of their medical records, or both, in accordance with § 103.22(b)(15) (relating to implementation). Upon the death of a patient, the hospital shall provide, upon request, to the executor of the decedent's estate or, in the absence of an executor, the next of kin responsible for the disposition of the remains, access to all medical records of the deceased patient. ***The patient or the patient's next of kin may be charged for the cost of reproducing the copies; however, the charges shall be reasonably related to the cost of making the copy."***

The Hospital Defendants entered into exclusive contracts with the Copy Service Defendants, requiring the Copy Service Defendants to copy records for selected or favored requestors at no charge or a very reduced charge. They allowed the Copy Service Defendants to recoup the cost of this free or reduced rate copying, by shifting the entire cost burden to Plaintiffs and members of their class who have requested copies of their hospital records.

These contractual arrangements allowed the Copy Service Defendants to systematically charge patients or their designees (usually their attorneys) for copying their hospital records for non-continuing care purposes, the sum of one ($1.00) dollar per page, for each page of hospital records copied, which sum was retained by the Copy Service Defendants; a "retrieval" fee remitted by the Copy Service Defendants to the hospital with whom they have contracted; an "administrative" or "basic" fee retained by the Copy Service Defendants; and postage and handling fees which often greatly exceed the actual postage associated with mailing copies of hospital records.

The discovery demonstrates a pattern of uniform conduct between the Hospital Class Defendants and the Copy Service Defendants, consisting of the following:

1. each hospital entered into a contract with one of the Copy Service Defendants, granting it the exclusive right to copy hospital records requested by patients or other requestors **(685, 692, 694, 698, 701);**

2. each hospital required the Copy Service Defendant to pay to that hospital a "retrieval" fee for services performed by hospital staff personnel in connection with fulfilling ("billable") requests;

3. each hospital required the Copy Service Defendant to copy a large quantity of hospital records free of charge ("non-billable" copying); or to copy them at a substantially reduced rate for certain favored requestors of those records **(717, 719, 826, 844);**[3]

4. none of the contracts regulate fees that can be charged by the Copy Service Defendants to "billable" requestors; and allow them to retain all monies billed and received from billable requestors;

5. the "billable" requestors, patients or their duly authorized designees (usually their attorneys), who request their records for non-continuing care purposes are charged at the rate of one ($1.00) dollar per page for each page of hospital records which are copied together with a retrieval fee; administrative fee; and postage **(726, 793, 882, 883, 886, 863, 864, 828-830)**;

6. as a profit-making organization, each Copy Service Defendant, in order to recoup the cost of free or non-billable copy service work demanded by the hospital as the price for securing the copy service contract, was of economic necessity, required to shift the entire cost burden of copy service work to the Plaintiff Class when Plaintiffs requested their hospital records on their own or through authorized designees, for non-continuing care purposes **(760, 865, 866)**;

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[3]The following requestors receive records free of charge: Hospitals; doctors' offices; Blue Cross; Blue Shield; Defender's Association; Veteran's Administration; Social Service Agencies; HMO's; the military; and the "Mercy Health Plan." **(850, 727-734, 857).** The following requestors are billed at reduced rates:

Workmen's Compensation Appeal Board, ten ($10.00) dollar flat charge; Medicare, seven ($.07) cents a page. **(731, 735, 736).**

Ironically, the charge of seven ($.07) cents a page to the Department of Health and Humans Services (DHS) for hospital records of Medicare patients resulted from settlement of a class action lawsuit brought by hospitals which attacked a DHS regulation requiring hospitals to copy those records for DHS free of charge. **(See, Swedish Hospital Corp. v. Shalala, 1 F.3d 1261, 1263-1265 (D.C. Cir. 1993).**

7. none of the Hospital Defendants ever conducted an investigation to determine if the page rate being charged to patients or their designees for non-continuing care purposes by the Copy Service Defendants with whom the hospitals contracted was in conformity with the regulation of the Pennsylvania Department of Health governing the operation of hospital medical records departments. **(853-855, 859, 759, 794-796).**

Each Plaintiff executed a Contingent Fee Agreement retaining an attorney to investigate claims on their behalf, for which purpose copies of their hospital records were needed to properly pursue the claims.

Four (4) Plaintiffs were represented by the law firm of Matty & Ferroni and one Plaintiff was represented by the law firm of Fell & Spalding to assert each Plaintiff's underlying claim.

The Contingent Fee Agreements executed by the four (4) Plaintiffs who retained Matty & Ferroni stated that their attorney's compensation ". . . for services shall be determined as follows":

1. Plaintiff Guy Colville

> ***"40% of any monies recovered*** by way of suit or settlement ***plus reimbursement of any costs."***
>
> "If there is no recovery there will be no charge ***for services rendered."*** **(414).**

2. Plaintiff Carmen Tomasetti

> ***"1/3 (33 1/3%) of all monies recovered.*** If no monies are recovered attorney to have no claim ***for services rendered. -- Attorney to advance all costs necessary, & to be reimbursed at settlement."*** **(470).**

3. Plaintiff Joseph Hoffman

> ***"40% of any monies recovered*** by way of suit or settlement."
>
> "If no monies are recovered there will be ***no fee*** for services rendered." **(433).**

4. Plaintiff Edward Ormsby

> ***"40% of all monies recovered*** by suit or settlement. If there is no recovery, there are ***no charges for any fees."*** **(455).**

Each Plaintiff represented by Matty & Ferroni testified it was his understanding that he was obligated to reimburse his attorney for costs if they were not successful in prosecuting his claim. **(580; 582; 584; 586, 587).**

The Contingent Fee Agreement by which McCarthy retained Fell & Spalding as her attorneys, provides the costs advanced by Fell & Spalding would be reimbursed from any fund recovered on behalf of Mrs. McCarthy; and that ***the absence of recovery ". . . shall not relieve me from the obligation of paying court costs and other proper litigation and investigative costs."*** **(497-499).**

Each Plaintiff signed a written medical authorization designating their attorney as an authorized representative to obtain copies of their hospital records to investigate the claims Plaintiffs wished to pursue.

The Copy Service Defendants conceded that a patient's hospital record could not be released to an attorney unless the patient signed a written authorization designating the attorney as the patient's representative to obtain those records. **(564, 566, 567, 569, 571).**

Matty & Ferroni, acting as counsel for Plaintiffs Hoffman and Tomasetti, submitted their clients signed authorization to the hospital Defendants at which they had been patients; received bills from the Copy Service Defendants for copying their records; advanced on behalf of Hoffman and Tomasetti the amount demanded by the Copy Service Defendants to copy their records; and ***upon settlement of their cases, were reimbursed by Hoffman and Tomasetti for the exact amount advanced by Matty & Ferroni in securing their clients' hospital records.*** **(903, 904, 906, 907).**[4]

These reimbursements, in accordance with the Contingent Fee Agreements], were paid by the clients to their attorneys separately from the fees received by their attorneys.

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[4]Matty & Ferroni acting as counsel for Plaintiffs Colville and Ormsby advanced the sums demanded by the Copy Service Defendants to secure copies of their hospital records. Those cases have not yet been resolved.

Those fees in conformity with the Contingent Fee Agreements were calculated on the gross recovery and were in no way affected or reduced by virtue of the cost reimbursements. **(903, 904, 906, 907).**[5]

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[5]The Contingent Fee Agreement with Tomasetti called for him to pay his attorneys ***"1/3 (33 13%) of all monies recovered."*** The Contingent Fee Agreement with Hoffman called for him to pay his attorneys ***"40% of any monies recovered***."

REASONS FOR GRANTING THE PETITION

We respectfully submit the court should grant this Petition for the following reasons:

1. whether an agent should be declared the "direct purchaser" of goods or services for which he has temporarily advanced funds on behalf of a principal under § 4 of the Clayton Act (15 U.S.C.A. § 15), is a question of federal law not yet settled by this Court;[6]

2. whether a "direct purchaser" who sustains no damages as a result of a price fixing scheme should nevertheless be authorized to seek damages under § 4 of the Clayton Act, is a question of federal law not yet settled by this Court; and,

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[6]The lower court majority, while recognizing that an attorney/client relationship is one of agent and principal, nevertheless concluded that the attorneys were not acting as agents for their clients when they purchased the hospital records in question. **(Appendix at 18a-22a.)**

The majority suggested that "Plaintiffs are no more direct purchasers of the hospital record photocopies at issue here than a passenger in a taxicab would be considered a direct purchaser of the gasoline used by the taxicab to carry the passenger to his destination." **(Appendix at 20a, fn. 17).**

It would appear the majority overlooked the distinction between general overhead on the one hand and funds advanced on behalf of a specific client, or passenger on the other hand. If a taxidriver agreed to take a passenger from Philadelphia to New York for a set fee plus toll charges, and upon arriving at a toll booth asked the passenger to hand him the money for the tolls, could it be denied that the passenger was the direct purchaser of the toll? If the taxidriver took the money out of his pocket, paid the tolls, and upon reaching the passenger's destination charged him the flat fee together with the amount advanced from his pocket to pay the tolls, would that not also be a situation in which the passenger was the direct purchaser of the tolls? Likewise, where an attorney advances funds solely on behalf of a client in representing the client, this advance is not a part of his or her general overhead, but rather is a cost directly attributable to the litigation for that client.

3. the holding of the lower court can be applied to § 4 Clayton Act damage suits in a variety of factual settings well beyond those presented by the facts of the instant case.

This Court has emphasized that only a "direct purchaser" in the chain of distribution of overcharged goods or services suffers a sufficient injury to ". . . his business or property . . ." under § 4 of the Clayton Act (15 U.S.C. § 15), so as to give that purchaser standing to pursue a private cause of action for damages under the antitrust laws. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224 (1968); Illinois Brick v. Illinois, 431 U.S. 720, 97 S.Ct. 2061 (1977); Kansas v. Utilicorp United Inc., 497 U.S. 199, 110 S.Ct. 2807 (1990).

The rationale for this rule is the court's concern that allowing both direct and indirect purchasers to institute suit, would create unworkable complexities of tracing and apportioning damages between different purchasers in the chain of distribution (see 97 S.Ct. at 2070); and would create a risk of duplicative and overlapping recoveries (see 97 S.Ct. at 2067).

The lower court relying on Utilicorp, supra., held that ***even if the attorneys received 100 percent reimbursement for the advance of funds on behalf of their clients***; they must be treated as the "direct purchaser" of those records; and thus the only persons with standing to assert a claim for damages arising from a scheme to fix prices for those records.[7]

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[7]The Majority Opinion states:

> **"Subsequently, in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), the Court reaffirmed its commitment to the 'direct purchaser' rule, refusing to carve out an exception to *Illinois Brick* for situations where the full cost of the product (and hence one hundred percent of any overcharge) had been passed on to the indirect purchaser." (McCarthy, et al. v. Recordex Services, Inc., et al., (Appendix at 12a, 13a.)**
>
> **"Furthermore, the fact that the costs of the photocopies were passed on to the client on a dollar for dollar basis (at least where the attorney obtained a recovery on behalf the client) is not dispositive. Indeed, the subcontractors in *Illinois Brick* and the utility companies in *Utilicorp* passed on their costs to the plaintiffs in those respective cases; yet the Supreme Court deemed this fact insufficient to confer standing to the indirect-purchaser plaintiffs in those cases."(McCarthy, et al. v. Recordex Services, Inc., et al., (Appendix at 19a, 20a.)**

In Utilicorp, this Court did not unequivocally accept the factual conclusion that 100 percent of the costs had been passed on by the public utility direct purchaser to its customers, stating ***"[t]he certified question, however, leaves unclear whether the respondent has passed on 'most or all' of its costs at the time of the suit."*** See, 110 S.Ct. at 2014.

This court did emphasize, however, that even if the public utility direct purchaser passed on 100 percent of the overcharge to its customers, it nevertheless had a damage claim resulting from the antitrust violation for lost sales; overcharges resulting from gas purchased for its own use; and losses resulting from the inability to raise its rates independently of the overcharge. See, 110 S.Ct.at 2814, 1815.

In the present case, the attorneys are not in the business of purchasing records; exercised no legal skill, and performed only a ministerial function when they temporarily advanced funds to obtain them on behalf of their clients.

At the successful conclusion of their clients' cases, they did not "pass on" to their clients the cost of obtaining those records as a fraction of some overall charge. Instead, they required their clients to reimburse them for the precise amount of money they advanced in obtaining the records. They separately calculated their fees for representing the clients as a percentage of the gross amount recovered for their clients.

Because their fees, in accordance with the Contingent Fee Agreements, were calculated on the gross amount of the recovery for their clients, the repayment of costs in no way reduced or affected the fees received by the attorneys; and the attorneys have, therefore, suffered no loss of profits or other damages as a result of the price fixing scheme.[8]

In Hanover Shoe, this Court stated:

> ***"We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer."*** (88 S.Ct. at 2232).

The court in Utilicorp, stated " . . . ***we might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury."*** See, 110 S.Ct. at 2818.

The language from Hanover Shoe, supra., and Utilicorp, supra., quoted above, suggests that this Court has left open the question raised by the facts of this case.

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[8]The Majority Opinion suggested that the attorneys received a profit "indirectly " because of the fee that they earned at the end of the case. **(Appendix at 18a, fn. 15).**

Moreover, the reasons which underlie this Court's "direct purchaser" rule do not exist in a case involving purchases of overcharged goods by an agent on behalf of a principal, when the agent is fully reimbursed for the purchase and suffers no other loss or damage as a result thereof.[9]

This case also directly raises the question of whether the "direct purchaser," while having standing to sue, may nevertheless have no recoverable damages; thereby allowing a price fixing scheme to go unremedied.

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[9]Because the attorney agents are fully reimbursed for the purchase of records, there are no unworkable complexities of tracing and apportioning damages between different purchasers in the chain of distribution. Because the attorney fees were calculated upon the gross recovery, the attorney suffers no other loss as a result of the overcharge and there is no risk of duplicative and overlapping recoveries.

Lower courts have recognized that the "direct purchaser" rule ***may provide a partial windfall*** to a direct purchaser who brings suit for an entire overcharge, but is nevertheless reimbursed for a portion thereof by the indirect purchaser. Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 327 (9th Cir. 1980); In Re Airline Ticket Commission Antitrust Litigation, 918 F. Supp. 283, 287 (D. Minn. 1996).[10]

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[10] In Royal Printing, the court stated:

> "Allowing Royal Printing to sue for the full overcharge, on the other hand, creates the possibility that Royal Printing might recover an amount, trebled, that exceeds its actual damages (because market forces probably forced the middlemen to absorb part of the overcharge); to that extent this alternative affords Royal Printing an opportunity for a windfall gain. ***But this is no more than was approved in Hanover Shoe, where the plaintiff was allowed to recover its 'full' damages even though it had 'mitigated' its damages by passing part of the excessive costs on to its customers.*** *Hanover Shoe* teaches that in such situations there is nothing wrong with the plaintiff winning a windfall gain, so long as the antitrust laws are vindicated and the defendant does not suffer multiple liability, with its potential for windfall loss (i.e., the defendant would be forced to pay out a greater amount, trebled, than its antitrust violation grossed for it)." 621 F.2d at 327.

This case, however, does not involve a partial windfall to a "direct purchaser" who has mitigated its damages by passing on part of the overcharge to its customer. Instead, it involves an agent who has been fully reimbursed for the entire charge.

For this reason, the holding of the lower court raises the spectre that a party who mechanically fits the definition of a "direct purchaser" but sustained no damages as a result of the price fixing scheme will be accorded standing to sue; and the "indirect purchaser" who sustained all of the damages flowing from that scheme will be barred from bringing suit.

The holding of the lower court will preclude any challenge to the "standing" of the attorneys to institute suit to recover damages for the price fixing scheme. However, since they have been fully reimbursed for that overcharge, and since their fees are calculated on the gross recovery, and, therefore, are not dependent upon or reduced as a result of the overcharge, it is likely that if they bring suit, the Defendants will be able to move for summary judgment on the grounds that they have suffered no damages in fact as a result of the price fixing scheme. If that occurs, a price fixing scheme could go unremedied.

Common sense would suggest that permitting suit by the direct purchaser under these circumstances violates entrenched principles requiring a plaintiff to show damage or harm resulting from a tortious wrong, whether it be from an antitrust overcharge or otherwise.

The holding of the lower court may also be applied in a variety of factual settings well beyond those presented by the facts of the instant case.

As an example, if a stockbroker sells a client's securities, the stockbroker will receive a fee based on the sale price. If the client, at the conclusion of the transaction, requests the broker to wire transfer the net proceeds from that sale into the client's bank account, the stockbroker is charged by its own bank the wire transfer fee for making this transfer. The broker is then fully reimbursed by the client for the wire transfer charge, separately from the fee charged for affecting the sale.

If it were alleged that wire transfer charges were excessive and resulted from a price fixing scheme among banks, the holding of the lower court in this case would prevent the client from seeking damages for the wire transfer overcharge, and would instead, give the right to bring suit to the stockbroker who was fully reimbursed for that charge and suffered no other harm resulting from that charge.

Where a customer makes a credit card purchase, it is the bank issuing the credit card that initially advances the funds for the purchase. It is then fully reimbursed by its customer for that charge separately from and together with the bank charges for use of the credit card.

Under the holding of the lower court, it would be the bank issuing the credit card that was the direct purchaser holding the right to institute suit, and not the customer who fully reimbursed the bank for the amount of that overcharge.

This Court has not previously decided the extent to which the "direct purchaser" rule applies where an agent advances funds to make a purchase on behalf of a principal, for which the agent is fully reimbursed; and with respect to which the agent suffers no injury or damage arising out of an overcharge for that purchase.

The facts in this case fit squarely within the hypothetical situation alluded to by this Court in Utilicorp as quoted above. We would respectfully submit that the Court should use this case as an opportunity to offer guidance to lower courts on whether its "direct purchaser" rule is to be mechanically applied in such circumstances.

The lower court in this case, while acknowledging that Pennsylvania state law would appear to make a disclosed principal responsible for purchases by its agent, disavowed those cases because they were not decided ". . . in the context of a federal antitrust action . . ." and because in ". . . none of these cases was the Illinois Brick direct purchaser rule at issue."[11]

It would appear, therefore, that the lower court was creating a federal common law standard for determining an agency relationship in interpreting a federal statute.

In United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S.Ct. 1448 (1979), this Court set out the factors that lower courts should use to determine whether a uniform federal rule is needed to decide federal claims based on federal statutes when Congress has not made clear its intent on what law should supply a rule of decision. See, Kimbell Foods, 440 U.S. at 728-29, 99 S.Ct. at 1458-59.

Those factors are: (1) whether the issue requires "a nationally uniform body of law"; (2) "whether application of state law would frustrate specific objectives of the federal programs"; and (3) whether "application of a federal rule would disrupt commercial relationships predicated on state law." See, Kimbell Foods, 440 U.S. at 728-29, 99 S.Ct. at 1458-59.

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[11]See, Majority Opinion. **(Appendix at 22a, fn. 18.)** The Dissenting Opinion argues that this is ". . . purely a question of state law"; and points out that the Majority Opinion ". . . does not suggest a reason why the agency question may turn out differently in the federal antitrust context, and I perceive none." **(Appendix at 33a fn. 4, Dissenting Opinion.)**

Since federal antitrust claims are committed to the exclusive jurisdiction of the federal courts, it is difficult to image any case in which a state court would discuss the relationship between an attorney and his or her client in the context of a federal antitrust suit or the Illinois Brick, direct purchaser rule.

This Court should review the lower court ruling which appears to create a federal common law rule to decide whether doing so in the context of the relationship between an attorney and a client ". . . would disrupt commercial relationships predicated on state law."

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

FELL & SPALDING

BY:
STEPHEN R. BOLDEN, ESQUIRE
ATTORNEY FOR PLAINTIFF

Date: 6/26/96

APPENDIX

Filed April 4, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1005

MARY RUTH MCCARTHY; GUY COLVILLE; EDWARD ORMSBY; CARMEN TOMASETTI; JOSEPH HOFFMAN,
Appellants

v.

RECORDEX SERVICE, INC.; COPYRIGHT, INC.; SMART CORP., National Headquarters Medical Records Copying; MEDFAX INCORPORATED; HOSPITAL CORRESPONDENCE COPIERS; MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA, Misericordia Hospital Division; METHODIST HOSPITAL; THE GRADUATE HOSPITAL; HAHNEMANN UNIVERSITY HOSPITAL; THE LOWER BUCKS HOSPITAL

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 93-cv-00281)

Argued Monday, January 22, 1996

BEFORE: STAPLETON, COWEN and GARTH,
Circuit Judges

(Opinion filed April 4, 1996)

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OPINION OF THE COURT

GARTH, *Circuit Judge*:

The instant appeal requires us to decide whether the plaintiff-clients, whose attorneys purchased photocopies of the clients' hospital records for the purpose of prosecuting their clients' personal injury and medical malpractice claims, have standing to bring an antitrust action against the sellers of the photocopies. We hold that such clients lack standing to bring a treble-damages claim because they are not "direct purchasers," as required by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). However, we also hold that these clients are not barred from seeking injunctive relief under section 16 of the Clayton Act.

I.

Plaintiffs Mary Ruth McCarthy,[1] Guy Colville, Edward Ormsby, Carmen Tomasetti[2] and Joseph Hoffman filed a three-count complaint, on January 19, 1993, against five hospitals (the "Hospital defendants")[3] and five copy-service

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1. McCarthy died subsequent to the institution of this litigation. A personal representative has been named for her but has not been formally substituted on the record, as of the date of this appeal.

2. Tomasetti died after commencing this action. No personal representative has been named as of the date of this appeal.

3. The Hospital Defendants are Mercy Health Corporation of Southeastern Pennsylvania, Misericordia Hospital Division ("Misericordia"); Methodist Hospital ("Methodist"); the Graduate Hospital ("Graduate"); Hahnemann University Hospital ("Hahnemann"); and the Lower Bucks Hospital ("Lower Bucks"). They are all hospital corporations that operate hospitals in the Commonwealth of Pennsylvania.

companies (the "Copy Service defendants").[4] The complaint asserted violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 (count I);[5] violations of the Racketeering, Influence, and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1433 and 1962 (count II); and violations of the civil rights laws, 42 U.S.C. § 1983 (count III). The complaint and amended complaint sought injunctive relief, money damages, class certification and attorneys' fees. In essence, plaintiffs allege that the Hospital Defendants and the Copy Service Defendants conspired to charge excessive prices for photocopies of medical records requested by patients or former patients.

Each of the named plaintiffs, at some time within four years before filing the instant action, were patients at hospitals owned by the Hospital Defendants. Each plaintiff had retained either Matty & Ferroni ("M&F"), a New Jersey law firm, or Fell & Spalding ("F&S), a Philadelphia firm, to file a personal injury or medical malpractice claim on his or her behalf. In each case, after the particular plaintiff had signed a medical consent form authorizing the appropriate hospital to release his or her medical records, the plaintiff's attorney requested photocopies of the client's hospital records. The copy service company, in each case, billed the attorney directly.[6]

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4. The Copy Service Defendants are Recordex Services, Inc. ("Recordex"), CopyRight, Inc. ("CopyRight"), Smart Corporation ("Smart"), Medfax, Inc. ("MedFax"), and Hospital Correspondence, Copiers ("HCC"). They are all corporations doing business in the Commonwealth of Pennsylvania, who have entered into contracts with one of the Hospital Defendants to perform copying services in response to requests for copies of hospital records.

5. Count I specifically alleges that the defendants engaged in a "contract combination or conspiracy in restraint of trade effecting [sic] interstate commerce"; and that "the defendants possess a monopoly in the relevant market for the performance of copying services of hospital patient records, and have willfully maintained that power in order to illegally extract unlawful prices for the performance of said copy services." Complaint at ¶ 52.

6. Tomasetti retained M&F, which requested copies of patient records from Hahnemann; Recordex provided the photocopying services and charged M&F $44.40. Hoffman retained M&F, which requested copies of

Each of the five plaintiffs had entered into a contingent-fee agreement with either M&F or F&S. With the exception of McCarthy, none of the plaintiffs were obligated under the relevant retainer agreement to reimburse the law firm for costs, including the photocopying expenses at issue, unless a monetary recovery in favor of the particular client was obtained.[7] McCarthy's agreement with F&S, on the other

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records from Lower Bucks; MedFax performed the photocopying and charged M&F $19.22. Both Tomasetti and Hoffman settled their cases and reimbursed M&F out of their settlement proceeds for the photocopying costs.

Colville retained M&F, which requested copies from Methodist; Smart, which performed the photocopying, charged M&F $25.49. Ormsby also retained M&F, which requested copies from Graduate; HCC photocopied the records, charging M&F $38.40. At the time this appeal was filed, neither Colville nor Ormsby had reached a settlement, and neither had reimbursed M&F for the copying expenses incurred. Ormsby has apparently discontinued his personal injury claim. App. at 536.

McCarthy retained F&S, which requested copies of her medical records from Misericordia. CopyRight, which was responsible for providing copying services related to requests for Misericordia patient records, billed F&S $540. F&S refused to pay the bill but eventually obtained the copies from opposing counsel. App. at 517-20, 525.

7. The four plaintiffs other than McCarthy entered into contingent fee agreements with M&F. Under these agreements, the law firm would receive its fee (33-1/3% for Tomasetti and 40% for each of the other three plaintiffs) only if it successfully litigated or settled the case. Under Colville's contract, M&F would be entitled to 40% of the recovery, plus reimbursement of any costs. The other three contracts only awarded M&F a percentage of the recovery (i.e. M&F would have to cover its costs out of its percentage share of the settlement or award).

None of the fee agreements entitled M&F to reimbursement of costs if the client failed to recover. Colville's contract provided: "If there is no recovery there will be no charge for services rendered." App. 414. Likewise, Hoffman's agreement stated: "If no monies are recovered there will be no fee for services rendered." App. 433. Ormsby's agreement similarly read: "If there is no recovery, there are no charges for any fees." App. 455. Finally, Tomasetti's contingent fee agreement provided: "If no monies are recovered attorney to have no claim for services rendered. — Attorney to advance all costs necessary, & to be reimbursed at settlement." App. 470.

hand, provided that "[t]he absence of a recovery shall not relieve [McCarthy] from the obligation of paying court costs and other proper litigation and investigative costs."[8] App. 498. However, Stephen R. Bolden, a partner at F&S, admitted in an affidavit that despite the contractual language, in actual practice, the firm never sought reimbursement for advanced costs where representation of the client did not lead to a recovery:

> Although under the express language in this Contingent Fee Agreement, Fell & Spalding is contractually entitled to seek reimbursement from a client even where a representation of that client has not led to the recovery of funds; as a matter of actual practice, where Fell & Spalding has been unsuccessful in obtaining a recovery of funds by way of settlement or otherwise . . . Fell & Spalding has not sought reimbursement for the costs incurred in copying a client's hospital records . . . .

App. 526.[9]

Each of the Hospital Defendants had entered into a contract with one of the Copy Service Defendants, granting the Copy Service Defendant the exclusive right to photocopy hospital records requested by patients or other members of the public entitled to such records. Under the contract, the copy-service company agreed to photocopy any medical records requested by patients or other requestors. The sole remuneration received by the Copy Service Defendants

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8. If McCarthy prevailed, F&S would receive a 1/3 contingent fee (calculated based on the amount of the award or settlement before deducting expenses) plus litigation expenses.

9. Richard C. Ferroni, a partner at M&F, similarly stated in an affidavit that

> [h]e had not, nor has his firm, ever sought reimbursement for costs (including costs of obtaining copies of a client's hospital records) from a client where there has not been a recovery in the action in which he or his firm has represented the client and the Contingent Fee Agreement does not address costs, although clients are advised they are responsible for costs regardless of outcome.

App. 536.

derived from the copying charges paid by the requestors. App. 685, 692, 694, 698, 701.

Patients or their attorneys were charged $1 per page for copies of medical records. In addition, they also typically paid a retrieval fee, which was remitted to the hospital; an "administrative" or "basic" fee (i.e. a flat fee unrelated to the number of copies), which was retained by the copy-service company; and postage and handling fees.

Certain "favored" requestors were charged a reduced rate[10] or no fee at all.[11] The Hospital Defendants set the schedule of charges, designating the requestors who would or would not be charged. Typically, sixty percent or more of the requests for hospital records were nonbillable.

Plaintiffs claim that the practice of subsidizing certain requestors while charging patients or their agents an inflated fee violated a Pennsylvania regulation, which provides in relevant part:

> Patients or patient designees shall be given access to or a copy of their medical records, or both . . . . Upon the death of a patient, the hospital shall provide, upon request, to the executor of the decedent's estate or, in the absence of an executor, the next of kin responsible for the disposition of the remains, access to all medical records of the deceased patient. The patient or the patient's next of kin may be charged for the cost of reproducing the copies; however, *the charges shall be reasonably related to the cost of making the copy.*

28 Pa. Code § 115.29 (emphasis added).

After plaintiffs filed an amended complaint, the defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court, by order dated

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10. For example, Medicare copy requests were billed at seven cents per page; and the Workmen's Compensation Appeal Board paid a ten dollar flat fee per request regardless of the number of pages actually copied.

11. For example, other hospitals, physician's offices, Blue Cross and Blue Shield, the Veteran's Administration and social service agencies received copies for free. The military and certain HMOs also received free copies.

August 5, 1993, denied defendants' motion to dismiss counts I (antitrust) and II (RICO) but granted the motion to dismiss count III (civil rights).

Subsequently, on April 4, 1994, plaintiffs moved to certify the case as a class action. On November 18, 1994, in a Memorandum and Order, the district court denied plaintiffs' motion for class certification.

On April 1, 1994, defendant Hahnemann filed a motion for partial summary judgment on count I (the antitrust claim), which was eventually joined by all of the defendants except Smart. The district court denied the motion for partial summary judgment in an order dated May 5, 1994.

Subsequently, Hahnemann moved for reconsideration. On July 8, 1994, the district court granted Hahnemann's motion for reconsideration and granted summary judgment on count I in favor of all defendants, holding that the plaintiffs lacked standing because they were not "direct purchasers" of the hospital records, within the meaning of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

On December 12, 1994, all of the defendants joined in a motion for summary judgment on the remaining RICO claim, on the theory that antitrust standing principles applied equally in the RICO context. On December 29, 1994, the district court granted summary judgment to all defendants on count II, thus disposing of all three counts of the complaint. Plaintiffs timely filed the instant appeal.

II.

The district court had jurisdiction over plaintiffs' antitrust and RICO claims under 15 U.S.C. § 15; 18 U.S.C. § 1964; and 28 U.S.C. § 1331. We have appellate jurisdiction over the district court's grant of summary judgment in favor of defendants under 28 U.S.C. § 1291.

The issue of antitrust standing is a legal issue, over which we exercise plenary review. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1164 (3d Cir. 1993), *cert. dismissed*, 114 S. Ct. 625, 652, *and cert. denied*, 114 S. Ct. 921 (1994). We also exercise plenary review of a district court's grant of summary judgment, applying the

same standards applied by the district court. *Rosen v. Bezner*, 996 F.2d 1527, 1530 (3d Cir. 1993); *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329, 333 (3d Cir. 1985).

Summary judgment is proper only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine dispute exists as to any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Moreover, any inferences to be drawn must be viewed in the light most favorable to the party opposing summary judgment. *Id.* at 247; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III.

A.

Almost twenty years ago, the Supreme Court articulated the so-called "direct purchaser" rule, an antitrust standing doctrine that barred downstream indirect purchasers from bringing an antitrust claim. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 744 (1977). Recognizing that allowing an indirect purchaser to assert an antitrust claim for the portion of an overcharge "passed on" to the indirect purchaser would create an intractable problem of tracing and apportioning damages between different purchasers in the chain of distribution, the Court chose to avoid this morass by enunciating a bright-line rule that only the purchaser immediately downstream from the alleged monopolist may bring an antitrust action. *Id.*

Almost a decade before *Illinois Brick*, the Supreme Court laid the foundation for the "direct purchaser" standing requirement in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which rejected a "pass-on" defense proffered by an antitrust defendant who claimed that the plaintiff was not entitled to treble damages for costs "passed on" to its customers. *Id.* at 487-89. In *Hanover Shoe*, the plaintiff shoe manufacturer, Hanover Shoe, Inc., brought suit under section 4 of the Clayton Act

against United Shoe Machinery Corp. (USMC), a manufacturer and distributor of shoe machinery, alleging that USMC had monopolized the shoe machinery industry by refusing to sell its equipment and requiring users to lease the equipment instead. *Id.* at 486-87. USMC argued that Hanover Shoe had been able to recoup its losses by charging its customers more for the shoes and thus did not suffer any cognizable injury because it had passed on the allegedly illegal overcharge to its customers. *Id.* at 487-88.

The Court rejected USMC's pass-on theory, explaining that entertaining such a defense would raise difficult proof issues as to the amount of the overcharge passed on and whether, absent the overcharge, Hanover Shoe could have raised its prices. *Id.* at 489-94. The Court also expressed concern that downstream buyers would have only "a tiny stake in a lawsuit" and thus little incentive to prosecute a private antitrust claim. *Id.* at 494. The Court reasoned that allowing a pass-on defense would diminish private antitrust enforcement and thereby increase the likelihood that violators of antitrust laws would escape liability. *Id.*

In *Illinois Brick*, the Supreme Court addressed the corollary to the problem they faced in *Hanover Shoe*: offensive use of the pass-on theory by indirect purchasers to recover treble damages for injuries "passed on" to them by intermediaries in the distribution chain. *Illinois Brick* involved a suit brought by the State of Illinois and 700 local governmental entities against a group of concrete block manufacturers, who had allegedly engaged in a price-fixing conspiracy. 431 U.S. at 726-27. The State and the local municipalities had hired general contractors for several large construction projects in the Chicago area. *Id.* at 726. The general contractors, in turn, had subcontracted the masonry work to certain masonry contractors who had purchased the allegedly overpriced blocks from the conspirators. *Id.* The State of Illinois and the local governmental entities were thus indirect purchasers of concrete block, two levels down the distribution chain from the manufacturers. *Id.*

Illinois and the other governmental entities claimed that part or all of the overcharge had been passed on by the subcontractors and general contractors. *Id.* at 727. As a

result, according to the plaintiffs, they had overpaid for the concrete block by more than three million dollars. *Id.* The Court dismissed the claim, holding that indirect purchasers may not sue for antitrust damages. *Id.* at 736.

The Court in *Illinois Brick* explained that the outcome was dictated by *Hanover Shoe* and that principles of judicial consistency compelled the Court to prohibit the offensive use of a pass-on theory where it had disallowed the defensive use of the pass-on doctrine in a similar factual situation. *Id.* at 730. The Court further explicated that permitting the latter while disallowing the former would create a risk of multiple liability: "A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant—by presuming that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff . . . ." *Id.*

The State posited that the danger of duplicative recovery could be avoided by apportioning the damages attributable to the concrete-block manufacturers' wrongful conduct. The Court, however, rejected the State's argument that indirect purchasers should be allowed to recover the fraction of the overcharge "passed on" to them, explaining:

> Permitting the use of pass-on theories . . . essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that would have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

Id. at 737.

Subsequently, in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), the Court reaffirmed its commitment to the "direct purchaser" rule, refusing to carve out an exception to *Illinois Brick* for situations where the full cost of the product (and hence one hundred percent of any

overcharge) had been passed on to the indirect purchaser. *Id.* at 216. In *Utilicorp*, the States of Kansas and Missouri, acting as *parens patriae*, brought an antitrust action on behalf of their residents, claiming that a pipeline company and five gas producers had conspired to inflate the price of the natural gas that they supplied to public utilities. *Id.* at 204. These utilities, according the States, had passed on the full amount of the overcharge to their residential and commercial customers. *Id.*

Kansas and Missouri argued that the concerns voiced in *Illinois Brick*, namely the difficulties of apportionment, the risk of multiple recovery and the diminution of incentives for private antitrust enforcement, were absent because regulated public utilities pass on one hundred percent of their costs to consumers, who are the ones that actually suffer antitrust injury. The Court forcefully rejected that argument, opining that "[a]lthough the rationales of *Hanover Shoe* and *Illinois Brick* may not apply with equal force in all instances, we find it inconsistent with precedent and imprudent in any event to create an exception for regulated public utilities." *Id.* at 208.

We have applied *Illinois Brick*'s antitrust standing principle on several occasions. For example, in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), we relied on *Illinois Brick* in holding that indirect purchasers of consumer bags could not maintain a treble-damages suit against the manufacturers of such bags. *Id.* at 575. In *Mid-West Paper*, the defendants manufactured so-called consumer bags—single or multilayered paper bags used for packaging pet foods, coffee, cookies, chemicals and the like. *Id.* The plaintiff-grocery stores purchased either empty consumer bags (which they used to package their own products) from middlemen and wholesalers or products that were pre-packaged in consumer bags for resale to their customers. *Id.* at 575-76. After reviewing the teachings of *Illinois Brick*, we determined that the "direct purchaser" rule barred the treble-damages claims of all of the plaintiffs (except Mid-West Paper Products Company, which had purchased consumer bags directly from a subsidiary of one of the defendants). *Id.* at 575.

Similarly, in *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984), non-factory-authorized dealers, who had purchased electrical generators from authorized dealers for resale in foreign markets, alleged that Caterpillar, the manufacturer of these electrical generators, had illegally imposed a penalty on its dealers to prevent or discourage the dealers from selling Caterpillar products to independent marketers. *Id.* at 960. The district court held that the plaintiffs had standing under *Illinois Brick* because the nonfactory-authorized dealers were the "direct target[s] of an unlawful conspiracy." *Id.* at 962. We reversed, holding that an indirect purchaser, even if a "direct target" of an antitrust conspiracy, lacked standing under *Illinois Brick*. *Id.* at 966.

Likewise, in *Link v. Mercedes-Benz, Inc.*, 788 F.2d 918 (3d Cir. 1986), Mercedes repair customers claimed that Mercedes dealers, who were required to purchase parts exclusively from Mercedes at artificially inflated prices, had passed on those costs to retail customers. *Id.* at 928-30. Citing *Illinois Brick*, we held that retail customers were indirect purchasers and therefore lacked antitrust standing. *Id.* at 930.

Most recently, in *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425 (3d Cir. 1993), we held that only the direct purchaser of an aircraft, and not a downstream buyer or assignee, had standing to pursue an antitrust claim. *Id.* at 439. We emphasized that "any exception to the direct purchaser rule would be inappropriate in this case for the same reasons that the Supreme Court held an exception would be inappropriate in *Utilicorp*." *Id.*

B.

Plaintiffs argue that the Supreme Court has receded from *Illinois Brick*'s "direct purchaser" rule. Specifically, plaintiffs contend that the "direct purchaser" requirement has been displaced by the multi-factor approach to antitrust standing outlined in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) [hereinafter "*AGC*"].

In *AGC*, the plaintiff-unions, representing California construction workers, sued an association of employers with whom the unions had entered into collective bargaining agreements. *Id.* at 522-24. The complaint alleged that the association and its members had coerced certain landowners and other contractors to hire non-union labor. *Id.*

In determining whether the plaintiff-unions had standing to sue under section 4 of the Clayton Act, the *AGC* Court employed a five-part analytical framework, which encompassed the following considerations: (1) the causal connection between the antitrust violation and the harm to the plaintiff (including whether the defendant intended to cause that harm), *id.* at 537; (2) whether the "nature" of the plaintiff's alleged injury is "of the type that the antitrust laws were intended to forestall," *id.* at 538; (3) the directness or indirectness of the asserted injury, *id.* at 541; (4) the existence of more direct victims of the alleged injury (i.e. whether the plaintiff is the party most likely to seek redress of the antitrust violation), *id.* at 542; and (5) the potential for duplicative recovery or complex apportionment of damages, *id.* at 543-44. The *AGC* five-factor framework was an attempt by the Court to synthesize and clarify the confusing collection of the then-extant antitrust-standing rules.[12]

Contrary to plaintiffs' intimation, however, the *AGC* Court neither overruled *Illinois Brick* nor limited its application.

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12. Prior to *AGC*, the courts of appeals applied a variety of different tests to determine standing under section 4 of the Clayton Act: (1) the "direct injury" test, *see Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1233 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); *Loeb v. Eastman Kodak*, 183 F. 704, 709 (3d Cir. 1910); (2) the "zone of interests" test, *see Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1151-1152 (6th Cir. 1975); and (3) the "target area" test, *see Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546-47 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Recognizing that these alternative formulations for assessing antitrust standing often led to contradictory and inconsistent results, the Supreme Court in *AGC* attempted to articulate a unified set of factors that could be applied generally in determining antitrust standing.

Indeed, the *AGC* Court cited *Illinois Brick* with approval. *See id.* at 544-45. Moreover, factors four and five in the *AGC* framework echo *Illinois Brick*'s concerns. In our view, *AGC* incorporates, rather than repudiates, the principles of *Illinois Brick*.[13]

Plaintiffs assert, however, that the absolute bar of the "direct purchaser" rule has been supplanted by *AGC*'s balancing approach. In support of this contention, plaintiffs cite to certain passages from our opinion in *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3d Cir. 1993), *cert. dismissed*, 114 S. Ct. 625, 652, *and cert. denied*, 114 S. Ct. 921 (1994), wherein we adumbrated that "indirect purchaser status is [not necessarily] the death knell of [an antitrust] claim . . . ." *Id.* at 1168. In *Lower Lake Erie*, several steel companies, dock companies and trucking companies filed civil actions in federal district court, alleging that the defendant railroad companies serving the lower Lake Erie industrial region had conspired to monopolize the transportation and handling of iron ore in the region. *Id.* at 1151, 1152.

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13. Of course, *AGC* and *Illinois Brick* address two analytically distinct aspects of antitrust standing. *See Merican*, 713 F.2d at 963-65 (noting that "the Supreme Court has recognized two types of limitations on the availability of the section 4 remedy which the courts must consider when examining whether a treble damage action may be maintained"). The *AGC* Court was concerned primarily with the issue of whether a particular plaintiff's injury was too remote from an antitrust injury to warrant providing that plaintiff a section 4 remedy. *Id.* at 964. This inquiry, akin to the determination of "proximate cause" in the negligence context, is subtle and resists the use of hard-and-fast "black letter" rules. *See id.*

In contrast, *Illinois Brick* dealt with the issue of whether a plaintiff who is able to trace an injury to an antitrust violation falls "within the group of 'private attorneys general' that Congress created to enforce the antitrust laws under section 4." *Id.* at 963. *Illinois Brick* focuses exclusively on the risk of duplicative recovery and the potential for overly-complex damages and apportionment calculations. *Id.* at 963-64. Because there would always be a risk of duplicative recovery, as well as the potential for complex apportionment computations, if indirect purchasers were allowed to bring antitrust claims, the "direct purchaser" rule, unlike the *AGC* standard, is a bright-line rule.

In a bifurcated trial, the liability jury found against Bessemer and Lake Erie Railroad Company (BL&E), the sole remaining defendant,[14] and in favor of all plaintiffs but one; and the damages jury awarded all but one claim for damages. *Id.* at 1151. On appeal, we applied *AGC* and affirmed the district court's denial of BL&E's motion to dismiss for lack of standing and the district court's denial of BL&E's motion for judgment n.o.v. *Id.*

Plaintiffs here contend that *Lower Lake Erie* requires that we set aside the district court's grant of summary judgment and remand for a determination of standing pursuant to the *AGC* factors. We disagree.

Lower Lake Erie is fully distinguishable. In *Lower Lake Erie*, we found that the plaintiffs' claims did not involve "the particular kind of double recovery *Illinois Brick* sought to prevent." *Id.* at 1169.

By contrast, all of the policy concerns expressed in *Illinois Brick* are implicated in the present case. First, there is considerable risk that the Hospital defendants and Copy Service defendants would be exposed to multiple liability. Although plaintiffs' attorneys here have chosen not to sue the defendants directly, it is probable that lawyers who themselves purchase photocopies of their clients' hospital records would bring treble-damage claims against the Hospital defendants and the Copy Service defendants in the future. Indeed, both the district court and this court inquired as to why the instant complaint had not been amended to substitute the attorneys as plaintiffs. No satisfactory answer was given. Hence, if we were to deny the defendants the protection of the "direct purchaser" rule, they could potentially be held liable to both the clients and the attorneys representing the clients.

Furthermore, this lawsuit involves apportionment problems perhaps more complex than those implicated in *Illinois Brick*. Because the costs of the photocopies are only passed on to the client, if the costs are passed on at all, on a contingent basis, the district court would be faced with complex statistical calculations as to the percentage of

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14. The other defendants all settled before trial.

photocopying costs borne by the attorneys as compared to the costs borne by their clients. In addition, the district court would have to ascertain the degree to which contingent fees charged to successful plaintiffs includes a recoupment of photocopying costs not charged to losing plaintiffs.

Under these circumstances, plaintiffs cannot escape the absolute bar of the "direct purchaser" rule. In order to survive summary judgment, plaintiffs must establish that the clients, and not their attorneys, are the direct purchasers of the hospital-record photocopies. On this record, no such proof exists.

C.

Plaintiffs argue that they, and not their lawyers, are the direct purchasers of the hospital record photocopies.[15] Plaintiffs contend that their attorneys merely acted as their agents in purchasing the photocopies. Citing *In re Toilet Seat Antitrust Litigation*, 1977-2 Trade Cases ¶ 61,601 (E.D. Mich. 1977), plaintiffs posit that purchases made by an agent on behalf of the agent's principal do not come within the scope of the "direct purchaser" rule.

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15. Plaintiffs first contend that their attorneys cannot be considered part of the chain of distribution because they do not make a profit from, or charge separately for, the photocopies. We are not persuaded for at least two reasons. First, in order for a consumer to be considered an indirect purchaser of an item, it is not necessary that the consumer incur a separate charge for that item; it is only necessary that the consumer have purchased the item through a middleman. For example, a homeowner who hires a housepainter who charges by the hour and does not invoice the homeowner separately for the cost of materials cannot be considered the "direct purchaser" of the paint used by the housepainter.

Second, attorneys do profit, albeit indirectly, from their purchase of their clients' hospital record photocopies. That is, they earn a contingent fee at the end of a successful action. Moreover, even if the attorneys failed to profit (or even if they suffered a loss) on the transaction, this fact does not transform their clients into direct purchasers. For example, in the previous hypothetical, the homeowner would still be considered an indirect purchaser even if the housepainter had charged a fee insufficient to recoup the costs of the paint job or if the housepainter had charged no fee at all.

We are unpersuaded by plaintiffs' argument and find *In re Toilet Seat Antitrust Litigation*, the single case relied upon by the plaintiffs in support of their agency theory, to be inapposite. That case involved an alleged conspiracy by toilet seat manufacturers to fix the price of wood-flour toilet seats. *See In re Toilet Seat Antitrust Litig.*, 387 F. Supp. 1342, 1343 (J.P.M.L. 1975). One of the plaintiffs, Harvey Lumber Company, purchased toilet seats through a purchasing agent, Biddle Purchasing Company, which actually placed the order for the toilet seats at a price approved by Harvey. Biddle received a flat monthly fee, unrelated to the quantity of toilets ordered, and kept no inventory. *In re Toilet Seat Antitrust Litigation*, 1977-2 Trade Cases ¶ 61,601, at 72,496. The district court concluded that under these limited circumstances, Harvey was a direct purchaser of the toilet seats and had standing to bring an antitrust claim.[16] *Id.* at 72,496-97.

In the present case, in contrast, none of the plaintiffs retained their lawyers to act as mere purchasing agents whose sole objective and function was to buy photocopies for the clients. Rather, each client hired his or her attorney to file a lawsuit on his or her behalf and to protect the client's legal interests. Moreover, a fair reading of the record reveals that the lawyers purchased the photocopies for their own use in representing their clients. The attorneys, and not the clients, were undeniably the direct purchasers of the photocopies.

Furthermore, the fact that the costs of the photocopies were passed on to the client on a dollar for dollar basis (at least where the attorney obtained a recovery on behalf the

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16. The district court relied on the dictum in footnote 16 of *Illinois Brick*, which stated: "Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Illinois Brick*, 431 U.S. at 736 n.16 (citing *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969) and *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 197, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974)). Because Harvey "controlled" Biddle's actions regarding purchases made on Harvey's behalf, the district court "view[ed] the relationship between Harvey and Biddle as falling within the above exception." *In re Toilet Seat Antitrust Litigation*, 1977-2 Trade Cases ¶ 61,601, at 72,497.

client) is not dispositive.[17] Indeed, the subcontractors in *Illinois Brick* and the utility companies in *Utilicorp* passed on their costs to the plaintiffs in those respective cases; yet the Supreme Court deemed this fact insufficient to confer standing to the indirect-purchaser plaintiffs in those cases.

Plaintiffs attempt to distinguish these precedents by characterizing the middlemen in those cases as "independent contractors." Plaintiffs take the position that the attorneys in the present case, in contrast, are agents and not independent contractors.

It is, of course, beyond cavil that the attorney-client relationship is an agent-principal relationship. However, attorneys are also independent contractors as well as agents. *See* Restatement (2d) Agency § 14N (1958) ("One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor."); *id.* § 14N comment a ("[M]ost of the persons known as agents, that is, brokers, factors, *attorneys*, collection agencies, and selling agencies *are independent contractors* . . . .") (emphasis added); 41 Am. Jur. 2d *Independent Contractors* § 4 (1995) ("[F]or example, *attorneys at law* . . . and other similar persons . . . are agents, although as to their physical activities they *are independent contractors* . . . .") (emphasis added); *see also Commonwealth v. Minds Coal Mining Corp.*, 60 A.2d 14, 20 (Pa. 1948) (adopting Restatement definitions of independent contractor).

An agent may be either an independent contractor or a servant (or employee in modern day parlance). *See* Restatement (2d) Agency § 2 comment b (1958) ("An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal."). Therefore, the relevant inquiry here is not whether a principal-agent relationship exists between

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17. Plaintiffs are no more direct purchasers of the hospital record photocopies at issue here than a passenger in a taxicab would be considered a direct purchaser of the gasoline used by the taxicab to carry the passenger to his destination. Moreover, even if a separate charge for gasoline were assessed, the taxi passenger still could not be considered a direct purchaser in any sense.

clients and their attorneys, but whether attorneys are independent contractors or mere employees. Although there are a number of factors relevant to this inquiry, *see* Restatement (2d) of Agency § 220 (1958), the most important factor is the degree of control exercised by the principal:

> The legal distinction between an employee and an independent contractor is so well established as to require little, if any, discussion. The characteristics of the former relationship is that the master not only controls the result of the work but has the right to direct the way in which it shall be done, whereas the characteristic of the latter is that the person engaged in the work has the exclusive control of the manner of performing it, being responsible only for the result.

Feller v. New Amsterdam Cas. Co., 70 A.2d 299, 300 (1950). *See also Moon Area Sch. Dist. v. Garzony*, 560 A.2d 1361, 1367 (Pa. 1989); *Hammermill Paper Co. v. Rust Eng'g Co.*, 243 A.2d 389, 392 (Pa. 1968).

It is clear that attorneys exercise "exclusive control of the manner of performing [their legal work], being responsible [to the client] only for the result." *Feller*, 70 A.2d at 300.

Furthermore, plaintiffs here are not even directly liable for the cost of the photocopies. Except for McCarthy, plaintiffs are liable only if their attorneys succeed in achieving a recovery on their behalf. Indeed, three of the contingent-fee agreements do not impose a separate charge for litigation costs; rather, the attorneys are reimbursed out of their percentage share of the settlement or award.

In McCarthy's case, although the retainer agreement does indicate that she is responsible for costs irrespective of the outcome, her attorney acknowledged that in actual practice, his law firm *never* charged clients unless the firm obtained a recovery. Furthermore, McCarthy faces another insurmountable obstacle: her attorney *never paid* the photocopying charges but rather obtained the needed copies from opposing counsel. Therefore, McCarthy (and indeed, even her attorney) cannot show any injury — much less antitrust injury.

Based on these undisputed facts, we must conclude that the clients are not direct purchasers.[18] And unless an exception to the "direct purchaser" principle applies here, the plaintiffs have no standing to assert their antitrust claim under count I.

D.

Plaintiffs argue, in the alternative, that *Illinois Brick* does not apply here because they fall within the "co-conspirator" exception to the direct purchaser rule. Citing to *Link*, 788 F.2d at 918, and *In re Brand Name Prescription Drugs Litigation*, 867 F. Supp. 1338 (N.D. Ill. 1994), plaintiffs advance the proposition that indirect buyers have standing to bring an antitrust claim against defendants who are co-conspirators in a vertical antitrust conspiracy. To the extent that these cases recognize a co-conspirator exception, however, we hold that plaintiffs have failed to establish the applicability of such an exception to the facts at hand.

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18. The attorneys are the real parties in interest. Indeed, as noted previously, the district court offered the plaintiffs' attorneys an opportunity to substitute themselves as the plaintiffs of record. Although the defendants did not object to the district court's proposal, the attorneys for the plaintiffs declined the court's offer, choosing instead to appeal the district court's adverse ruling as to standing.

We acknowledge that generally an attorney is to be considered the agent of the client, and as such, would not be held personally liable for expenditures made for a disclosed principal. *See Messenger Publishing Co. v. Walkinshaw*, 157 A. 18 (Pa. Super. Ct. 1931). However, the Pennsylvania Supreme Court has yet to address this subject and there is a wealth of authority that an attorney ordering goods or services in connection with litigation, as is the case here, ordinarily be treated as a principal and hence would be liable for such expenses.

Even the lower courts in Pennsylvania, whose decisions are not binding on us, have had difficulty with this issue. *See Pessano v. Eyre*, 13 Pa. Super. 157 (1900). But neither the cases revealed by the parties' research nor those revealed by our own research have discussed this issue in the context of a federal antitrust action, such as we have here. In none of those cases was the *Illinois Brick* direct purchaser rule at issue. We are satisfied that in the instant antitrust context, the attorney-appellants do not have standing to prosecute this action.

Preliminarily, we reject plaintiffs' reading of *Link* as establishing an exception to *Illinois Brick* where the middlemen, from whom the plaintiffs made purchases, participated in a vertical antitrust conspiracy. To the contrary, in *Link*, we expressly refused to adopt such an exception where the alleged co-conspirators immediately upstream were not also joined as codefendants:

> Alternatively, appellants argue that this court should carve out a narrow exception to *Illinois Brick* in vertical conspiracies where the intervening parties in the distribution process are named as co-conspirators (a so-called "co-conspirator exception"). *We decline to recognize this exception where, as here, the alleged co-conspirators are not also joined as co-defendants.*

Link, 788 F.2d at 931 (citations omitted) (emphasis added).

Similarly, in *Brand Name*, although the district court did allow the plaintiff retailers of pharmaceutical drugs to sue both the manufacturers and the wholesalers, it did so on the basis that the plaintiffs had alleged that the parties *immediately upstream* (i.e. the wholesalers) had colluded with the manufacturers to fix prices. The plaintiffs had not alleged that overcharges were *passed on* but rather that the wholesalers, as part of a price-fixing conspiracy, had *directly* imposed an overcharge on the plaintiff retailers. *See Brand Name*, 867 F. Supp. at 1344.

Most significantly, the district court in *Brand Name* emphasized that the reason it had not granted summary judgment in favor of the manufacturer-defendants was because "the plaintiffs ha[d] named [as defendants] a large percentage of all possible [wholesalers who had allegedly participated in the conspiracy]." *Id.* at 1346. The district court declined to "penalize[ ] [the plaintiffs] for the failure to join every single [w]holesaler [involved in the alleged conspiracy] . . . ." *Id.*

Plaintiffs here posit that they have joined all of the co-conspirators in the alleged conspiracy (i.e. the Hospital defendants and the Copy Service defendants). Reasoning that they have thereby satisfied the requirements of the co-conspirator exception, plaintiffs argue that they should therefore be accorded standing to bring an antitrust claim

even though they are not direct purchasers. We cannot agree.

Plaintiffs misconstrue *Brand Name* and *Link*, and misconceive the nature of the co-conspirator exception. In order to fall within the exception, plaintiffs here would have to allege that the intermediaries *immediately upstream*, that is, the attorneys, colluded with the defendants to overcharge plaintiffs for the photocopies. Moreover, plaintiffs would be obliged to join the lawyers as defendants, which they have not done. In sum, the co-conspirator exception does not apply here.

E.

Plaintiffs also suggest that the present case falls within the "pre-existing cost-plus contract" exception to the direct purchaser rule. This exception arises from dictum in *Hanover Shoe*:

> We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present.

Hanover Shoe, 392 U.S. at 494.

The vitality of the "pre-existing cost-plus contract" exception is doubtful, however, in light of *Utilicorp*. The Supreme Court, in that case, expressly refused to recognize an exception to *Illinois Brick* even where one hundred percent of the cost increases had been passed through to indirect purchasers. *Utilicorp*, 497 U.S. at 216.

Moreover, even if this exception survived *Utilicorp*, plaintiffs have failed to show that they meet the prerequisites of this exception. Specifically, plaintiffs have failed to show the existence of a *pre-existing* agreement to purchase a fixed quantity of photocopies from the attorneys. *See Mid-West Paper*, 596 F.2d at 580. In addition, as discussed earlier, plaintiffs have failed to demonstrate that they must pay the full cost of the copies

since their liability for litigation costs is only contingent in nature.

In sum, plaintiffs have failed to establish that any exception to the direct purchaser rule obtains. Thus, we hold that plaintiffs lack standing to pursue their antitrust claim (count I).

IV.

Significantly, antitrust standing principles apply equally to allegations of RICO violations. *See Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 270 (1992). The precepts taught by *Illinois Brick* and *Utilicorp* apply to RICO claims, thereby denying RICO standing to indirect victims. *Wooten v. Loshbough*, 951 F.2d 768, 770 (7th Cir. 1991); *County of Oakland v. City of Detroit*, 866 F.2d 839, 851 (6th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985); *Terre Du Lac Ass'n v. Terre Du Lac, Inc.*, 772 F.2d 467, 473 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); *Daley's Dump Truck Serv., Inc. v. Kiewit Pac. Co.*, 759 F. Supp. 1498, 1504 (W.D. Wash. 1991), *aff'd sub. nom., Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1644 (1993). Indeed, plaintiffs have conceded that, if they lacked antitrust standing, they also lacked RICO standing. *See* Plaintiffs' Motion to Secure Certification (Nov. 29, 1994), at 3-4 (App. at 1168-69).

Hence, the central and dispositive issue is whether plaintiffs are "direct purchasers." If so, they are entitled to pursue both their antitrust and RICO claims. If not, and insofar as damages are concerned, the district court properly granted summary judgment in favor of the defendants.

V.

Finally, plaintiffs argue that even if they lack standing to recover damages under section 4 of the Clayton Act,[19] they

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19. Section 4 of the Clayton Act allows for recovery of treble damages in a private antitrust action:

may still seek injunctive relief under section 16 of the Act.[20]

Standing analysis under section 16 is not identical to that for section 4. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n.6 (1986). "Section 16 has been applied more expansively, both because its language is less restrictive than that of § 4 . . . and because the injunctive remedy is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy . . . ." *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210 (3d Cir. 1980). Most importantly, "because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries [i.e. the concerns voiced in *Illinois Brick*], some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16." *Cargill*, 479 U.S. at 111 n.6.

In *Mid-West Paper*, we expressly rejected the contention that the direct purchaser rule bars injunctive relief under section 16 as well as a treble damages suit under section 4. We explained that

> in contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations—such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses—that the Supreme Court emphasized when limiting the availability of treble damages.

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a).

20. Section 16 provides in relevant part:

> Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws.

15 U.S.C. § 26.

Mid-West Paper, 596 F.2d at 590. *See also Merican*, 713 F.2d at 962 n.6; *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1167 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). We cautioned that

> the rule of standing urged by the defendants, which would completely bar indirect purchasers from seeking injunctive relief, would leave a serious gap in the antitrust enforcement scheme, as the fate of these injured parties, and of the competitive economy in an entire industry, would be made dependent upon the willingness of the government and the direct purchasers to assume the burdens of a lengthy lawsuit.

Mid-West Paper, 596 F.2d at 593-94.

Although plaintiffs need not satisfy *Illinois Brick*'s "direct purchaser" requirement in order to seek injunctive relief, they must still make a threshold showing of entitlement to injunctive relief. That is, plaintiffs must show: (1) threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust violation. *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183, 1186 (10th Cir. 1983). Because the district court never considered whether plaintiffs would be entitled to injunctive relief under section 16, separate and apart from the *Illinois Brick* standing rule, we will remand to allow the district court to undertake such an analysis.

VI.

For the foregoing reasons, we will affirm the district court's grant of summary judgment in favor of the defendants on plaintiffs' treble-damages claim (count I) and RICO claim (count II),[21] but we will reverse as to plaintiffs'

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21. Count III, the civil rights claim, was dismissed by the district court and is not on appeal before us.

claim for injunctive relief and remand for further proceedings consistent with this opinion.[22]

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22. Although the injunctive relief issue was only perfunctorily briefed and discussed, we seriously question whether the issue can be successfully pursued. We note, for instance, that plaintiffs apparently have obtained all of the medical records relevant to their particular personal injury claims, and there is little, if any, likelihood that plaintiffs will request additional copies of those records from the defendants. Moreover, it is highly doubtful that additional hospital records pertaining to plaintiffs' personal injury claims will be generated. Nevertheless, because our precedents require that a claim for an injunction under section 16 be treated differently than a claim for treble damages under section 4, it is appropriate that the district court, rather than this Court, consider the merits of the claim for injunctive relief in the first instance.

STAPLETON, J., Concurring in part and dissenting in part:

As the court acknowledges, it is "beyond cavil that the attorney-client relationship is an agent-principal relationship." (Majority Op. at 20.) Nevertheless, the court declares that the "attorneys [in this case], and not the clients, were undeniably the direct purchasers of the photocopies." (Majority Op. at 19.) The first of these inconsistent propositions is clearly correct; it necessarily follows that the second is not. Because the photocopies were purchased from the defendant copy services by the attorneys, as agents for their disclosed client-principals, it is the clients, and not the attorneys, who purchased them. For this reason, I would reverse the judgment of the district court and remand for further proceedings on all of the plaintiffs' claims.

I.

In part III-B, the court concludes that: (1) the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) [hereinafter *AGC*], neither overruled *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), nor limited its application; (2) "*AGC* incorporates, rather than repudiates, the principles of *Illinois Brick*," (Majority Op. at 15;) (3) *AGC* and *Illinois Brick* address two distinct aspects of antitrust standing; and (4) in order to escape summary judgment, the plaintiffs must establish that they and not their attorneys are the direct purchasers of the photocopies. I agree.

Whether the plaintiffs are direct purchasers of the copies, however, depends on whether the attorneys are agents for the plaintiffs with respect to the purchase of the copies. If the attorneys bought the copies as agents for the plaintiffs, then the plaintiffs are the direct purchasers of the copies. If, on the other hand, the attorneys purchased the copies on their own behalves, then the plaintiffs are indirect purchasers of the copies. When the applicable law is applied to the facts reflected in the summary judgment record, the conclusion is inescapable that the attorneys purchased the copies for their clients and that the clients are the direct purchasers.

A.

In Pennsylvania, the elements of agency are "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." *Scott v. Purcell*, 415 A.2d 56, 60 (Pa. 1980) (quoting *Restatement (Second) of Agency* § 1, Comment b (1958)). When a lawyer undertakes to represent a client, he consents to the client's having control of the representation even though he may be expected to exercise professional judgment with respect to the means of pursuing the objectives of the representation. Pennsylvania Rules of Professional Conduct 1.2(a). For this reason, the attorney-client relationship, as the court acknowledges, is generally regarded as an agency relationship. As a principal, the client is bound by the actions of the attorney in the course of the representation. As an agent, the attorney, like other agents, is a fiduciary and owes to his client-principal a duty of care, obedience, and loyalty. *Restatement (Second) of Agency* §§ 377-398; *e.g.*, Pennsylvania Rules of Professional Conduct 1.1, 1.2, 1.3, 1.15. In particular, an attorney who obtains tangible property in the course of carrying out the agency owes to his client-principal a duty to exercise reasonable care in its protection, to use it only in accordance with the directions of the principal and for his benefit, and to surrender it upon demand on the termination of the agency. *Id.* § 422; Pennsylvania Rules of Professional Conduct 1.15, 1.16(d). While the attorney may have a lien to secure any unpaid compensation, it is only a lien and any tangible property obtained or created in the course of the representation belongs to the client-principal. Pennsylvania Rules of Professional Conduct 1.16(d).

The record here reflects typical attorney-client relationships between the plaintiffs and their attorneys. The attorneys agreed to represent the plaintiffs in their personal injury suits and thus to obtain on their behalf the goods and services necessary to prosecute those suits.[1] Although

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1. Of course, it is understood that an attorney obtains goods used generally in his practice, such as office supplies, on his own behalf. Office supplies are analogous to the paint purchased by a housepainter or the gasoline purchased by a taxicab driver in the court's hypotheticals. (See Majority Op. at 18 n.15; 19 n.17.)

the attorneys, as permitted by Pennsylvania's Rules of Professional Conduct,[2] are *advancing* to their clients the expenses associated with litigating their cases, this does not, in my view, alter the relationship between the attorneys and their clients or between the clients and third parties with whom the attorneys deal on the clients' behalf. By contrast, nothing in the record suggests that the attorneys are purchasing the records on their own behalves in the hope of making a profit on resales to their clients.

The attorneys' role as agent is controlling here because, unless otherwise agreed, an agent for a disclosed principal is not a party to a contract that the agent enters on behalf of the principal. *Restatement (Second) of Agency* § 320 (followed in *Revere Press, Inc. v. Blumberg*, 246 A.2d 407, 409 (Pa. 1968)). Thus, unless it is agreed that such an agent is to be a party to a contract, the contract is, in effect, a contract between the principal and the third party. *Restatement (Second) of Agency* § 292 (followed in *Hillbrook Apartments, Inc. v. NYCE Crete Co.*, 352 A.2d 148, 154 (Pa. Super. Ct. 1975)). Accordingly, where, as here, an attorney purchases photocopies of records and it is understood by the seller that they are being purchased on behalf of his client, the client and not the attorney is the purchaser. My review of Pennsylvania case law convinces me that Pennsylvania subscribes to these basic principles of agency in the context of the attorney-client relationship.

In *Moore v. Porter*, 13 Serg. & R. 100 (Pa. 1825), the Supreme Court of Pennsylvania addressed the remedies available to a prothonotary to collect fees incurred by litigants. The court held that "[t]he party for whom the services are done, is responsible for the fees, and to him is

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2. Pennsylvania's Rules of Professional Conduct 1.8(e) provides:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
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> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

the [prothonotary] to look. . . . The fees are not chargeable to the attorney of the party for whom the services are done, unless he has become security for the costs." *Id.* at 101.

Pessano v. Eyre, 13 Pa. Super. 157 (1900), involved a suit by an expert witness against the attorney that hired him in pursuit of his client's claim. The superior court held that "[i]f . . . there was no express direct undertaking on the part of the [attorney] to pay what was due to the [expert witness], that is the end of the matter," because the expert witness could not collect from the attorney. *Id.* at 163. The attorney would be liable to the expert witness only if the attorney "ma[de] himself liable by a special promise." *Id.*[3]

In *Messenger Publishing Co. v. Walkinshaw*, 157 A. 18 (Pa. Super. Ct. 1931), the superior court held that where an attorney orders copies of "a paper book used on appeal" from a publishing company, the attorney does so in his capacity as an agent for his client. As the court explained:

> When an attorney has been acting for the defendant up to judgment and the client acts with him in the taking of an appeal and the attorney orders the printing of the paper-books required by the rules of the appellate court, it is to be presumed that he is acting under authority from his client. At least, the ordering of the paper-books is within the scope of the attorney's authority.

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3. The court concludes that in *Pessano v. Eyre*, 13 Pa. Super. 157 (1900), the superior court "had difficulty with this issue." (Majority Op. at 21-22 n.18.) I am not sure of which difficulty the court speaks. On the contrary, the superior court in *Pessano* plainly articulates the principle that while an agent is not generally liable on a contract made on behalf of a disclosed principal, "even where the agency is known, an agent . . . may render himself liable by an express undertaking." *Pennsylvania R. Co. v. Gallagher*, 101 A.2d 401, 402 (Pa. Super. Ct. 1953). In the record in this case, there is no evidence of an express undertaking of liability by the attorneys. Moreover, the fact that the attorney may commit himself to be responsible to the seller for the purchase price does not mean that the client is not also responsible or that any property purchased in the sale on behalf of the client does not belong to the client.

Id. at 19 (quoting *Huntzinger v. Devlin*, 80 Pa. Super. Ct. 187 (1922)). Thus, the publishing company, the court held, could not collect from the attorney.

Based on *Moore*, *Pessano*, *Walkinshaw*, and *Huntzinger*, I conclude that in Pennsylvania, "when an attorney contracts with a third party for the benefit of a client for goods or services to be used in connection with the attorney's representation of a particular client and the third party is aware of these facts, the attorney is not liable on the contract unless he either expressly or impliedly assumes some type of special liability." *Eppler, Guerin & Turner, Inc. v. Kasmir*, 685 S.W.2d 737, 738 (Tex. Ct. App. 1985).[4] Numerous jurisdictions agree. *See Christensen, O'Connor, Garrison & Havelka v. State of Washington, Department of Revenue*, 649 P.2d 839, 843 (Wash. 1982); *Hasbrouck v. Krsul*, 541 P.2d 1197, 1198 (Mont. 1975); *In re May*, 261 N.E.2d 109, 110 (N.Y. 1970); *Kates v. Millheiser*, 569 So.2d 1357, 1357 (Fla. Dist. Ct. App. 1990); *Free v. Wilmar J. Helric Co.*, 688 P.2d 117, 119-20 (Or. Ct. App. 1984); *Weeden Engineering Corp. v. Hale*, 435 So.2d 1158, 1160 (La. Ct. App. 1983); *Petrando v. Barry*, 124 N.E.2d 85, 87 (Ill. Ct. App. 1955); 7A C.J.S. *Attorney and Client* § 140 (1980) ("In the absence of assumption of personal liability, an attorney is generally not liable for work done by third persons in connection with his representation of a client.").

Under this case law, the plaintiff-clients, and not their attorneys, are responsible for the purchase price of the photocopies. Moreover, the record reflects that they have had to pay in the past[5] and will continue to have to pay in the future[6] the prices that the copy services choose to

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4. The court intimates that Pennsylvania case law may be inapposite because no Pennsylvania case discusses the agency issue in a federal antitrust context and none address the direct purchaser rule. (*See* Majority Op. at 21-22 n.18.) In my view, this distinction is not significant because the agency status of the attorneys is purely a question of state law. The court does not suggest a reason why the agency question may turn out differently in the federal antitrust context, and I perceive none.

5. As the court acknowledges in footnote 6, plaintiffs Thomasetti and Hoffman have covered their attorneys' advances.

6. Even if one credits the testimony that F&S chooses not to press its contract right to reimbursement in unsuccessful cases, it is clear that the clients will wind up paying the purchase price of the photocopies in all successful cases.

charge. Assuming that an antitrust violation has affected the prices that the copy services charge, I fail to understand how there could be a more direct causal relationship between that violation and the plaintiffs' alleged injuries.

B.

The court concludes that because the attorneys are independent contractors with respect to the purchase of the copies, the attorneys, rather than the plaintiffs, are the direct purchasers of the copies. The issue of whether the attorneys are independent contractors is simply not relevant here, however. Independent contractor status is relevant only to determine the extent of a principal's tort liability to third parties. According to the law of *respondeat superior*, where B acts for the benefit of A and commits a tort and injures C, if B is an independent contractor, then C cannot recover from A regardless of whether B is A's agent. If, on the other hand, B is a servant of A, then C can recover from A regardless of whether B is A's agent. Thus, even if it be true that the plaintiffs' attorneys are independent contractors, all this tells us is that the plaintiffs are not responsible to third parties for torts committed by the attorneys. It tells us nothing about whether the attorneys, as their agents, purchased the copies on their behalves. *See Restatement (Second) of Agency* §§ 2, 219-220.

II.

Because antitrust standing principles apply equally to allegations of RICO violations, I would conclude, for the foregoing reasons, that the plaintiffs may go forward on their RICO damage claims. Because I agree with the court that the plaintiffs have standing to prosecute their claim for injunctive relief under Section 16 of the Clayton Act, I would remand for further proceedings on all of plaintiffs' claims.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1005

MARY RUTH MCCARTHY; GUY COLVILLE;
EDWARD ORMSBY;
CARMEN TOMASETTI; JOSEPH HOFFMAN,

Appellants

v.

RECORDEX SERVICE, INC.; COPYRIGHT, INC.; SMART CORP., National Headquarters Medical Records Copying; MEDFAX INCORPORATED; HOSPITAL CORRESPONDENCE COPIERS;
MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA, Misericordia Hospital Division;
METHODIST HOSPITAL; THE GRADUATE HOSPITAL;
HAHNEMANN UNIVERSITY HOSPITAL;
THE LOWER BUCKS HOSPITAL

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, SAROKIN and GARTH*, Circuit Judges

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Stapleton, Judge Lewis and Judge Sarokin would have granted rehearing in banc.

By the Court,

"s/
Circuit Judge

Dated: APR 30 1996

* As to panel hearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1005

MARY RUTH MCCARTHY, GUY COLVILLE; EDWARD ORMSBY;CARMEN TOMASETTI, JOSEPH HOFFMAN,

Appellants

v.

RECORDEX SERVICE, INC.; COPYRIGHT, INC.; SMART CORP., National Headquarters Medical Records Copying; MEDFAX INCORPORATED; HOSPITAL CORRESPONDENCE COPIERS; MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA, Misericordia Hospital Division; METHODIST HOSPITAL; THE GRADUATE HOSPITAL; HAHNEMANN UNIVERSITY HOSPITAL; THE LOWER BUCKS HOSPITAL

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 93-cv-00281)

Present: Stapleton, Cowen and Garth, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 22, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered

December 29, 1994, be, and the same is hereby affirmed insofar as summary judgment was granted in favor of the defendants on plaintiffs' treble-damages claim (Count I) and Racketeering, Influence, and Corrupt Organization Act (RICO) claim (Count II), and reversed as to plaintiffs' claim for injunctive relief and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court. All of the above in accordance with the opinion of this Court.

ATTEST:

"s/ P. Douglas Sisk"

Clerk

Dated: April 4, 1996

Certified as a true copy and issued in lieu of formal mandate on May 8, 1996.

Teste: "s/ P. Douglas Sisk"

Clerk, U.S. Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY RUTH MCCARTHY, GUY COLVILLE, EDWARD ORMSBY, CARMEN TOMASETTI, and JOSEPH HOFFMAN,	:	Civil Action
	:	No. 92-281
Plaintiffs,	:	
v.	:	
RECORDEX SERVICE, INC., COPYRIGHT, INC., SMART CORP., MEDFAX, INCORPORATED, HOSPITAL CORRESPONDENCE COPIERS, MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA MISERICORDIA HOSPITAL DIVISION, METHODIST HOSPITAL, THE GRADUATE HOSPITAL, HAHNEMANN UNIVERSITY HOSPITAL and THE LOWER BUCKS HOSPITAL,	:	FILED JUL 8 - 1994
	:	ENTERED: 7/11/94
		CLERK OF COURT
Defendants.		

ORDER

AND NOW, this 8th day of July, 1994, upon consideration of defendant, Hahnemann University Hospital's ("Hahnemann") motion for reconsideration of this Court's May 5, 1994 Order denying Hahnemann's motion for partial summary judgment, the court states the following:

1. The above-captioned class action was filed against defendants, all of whom are hospitals or hospital record photocopying companies, alleging that defendants have conspired patients' hospital records throughout the Commonwealth of Pennsylvania. Plaintiffs are persons with personal injury or malpractice claims whose attorneys subsequently sought to obtain plaintiffs' hospital records in the furtherance of their underlying tort claims.

2. Count I of the Complaint seeks damages pursuant to the Sherman Anti-Trust Act, 15 U.S.C.A. § § 1 and 2.

3. On April 1, 1994 Hahnemann filed a motion for partial summary judgment, which sought to dismiss plaintiffs' antitrust claims for lack of standing. Hahnemann argued that plaintiffs' attorneys, not plaintiffs themselves, were the "direct purchasers" of the hospital records at issue, and the U.S. 720 (1976) had established that only direct purchasers of a product had standing to make an antitrust claim under the Sherman Act. Many of the remaining defendants joined in the motion.

4. On May 5, 1994, the Court denied Hahnemann's motion for partial consideration of the Court's denial on May 10, 1994, and on May 24, 1994, a hearing was held at which the parties argued the reconsideration motion.

5. Also pending before the Court is plaintiffs' motion for class certification, which was filed April 1, 1994 and answered on May 18, 1994.

6. After giving extended consideration to plaintiffs' antitrust claims, the Supreme Court's rulings on antitrust standing, and considering all the arguments made by counsel, both written and oral, I am satisfied that my May 5, 1994 decision which denied Hahnemann's partial summary judgment motion should be reconsidered because plaintiffs cannot be considered the "direct purchasers" of the hospital records at issue. The Supreme Court has stated that attempts to "to litigate a series of exceptions" to the direct purchaser rule would be

"unwarranted and counterproductive," and the Third Circuit Court of Appeals recently reiterated that admonition. Gulfstream III Associates quoting Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1991).

7. In that the antitrust standing issue is closely related to many of the issues raised in plaintiffs' class certification motion, I will provide a more extended analysis of the standing issue when I decide the class certification motion.

8. Defendant Hahnemann University Hospital's motion for reconsideration is GRANTED; and

9. Defendant Hahnemann University Hospital's motion for partial summary judgment is GRANTED, and plaintiffs' antitrust claims, as set forth in Count I of the Complaint, are DISMISSED.

By the Court:

"s/ Robert F. Kelly, J."

FILED NOV 18 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY RUTH MCCARTHY, GUY COLVILLE, EDWARD ORMSBY, CARMEN TOMASETTI, and JOSEPH HOFFMAN,	:	Civil Action
	:	No. 92-281
Plaintiffs,	:	
v.	:	
RECORDEX SERVICE, INC., COPYRIGHT, INC., SMART CORP., MEDFAX, INCORPORATED, HOSPITAL CORRESPONDENCE COPIERS, MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA MISERICORDIA HOSPITAL DIVISION, METHODIST HOSPITAL, THE GRADUATE HOSPITAL, HAHNEMANN UNIVERSITY HOSPITAL and THE LOWER BUCKS HOSPITAL,	:	ENTERED: 11/21/94 CLERK OF COURT
Defendants.	:	

MEMORANDUM

R.F. KELLY, J. NOVEMBER 18, 1994

Plaintiffs seek to represent a class consisting of persons who were patients of hospitals within the Commonwealth of Pennsylvania and were charged 'grossly excessive' fees to obtain copies of their medical records. Plaintiffs allege that defendants, who are Pennsylvania hospitals or copy service providers, have conspired to systematically

'fix prices' of copy charges well above and beyond what could be charged in a free and competitive market.

Plaintiffs filed suit under the Sherman Anti-Trust Act, 15 U.S.C. § § 1 and 2, and the Racketeering, Influence, and, and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1433 and 1962. On July 8, 1994, I granted a motion for partial summary judgment filed by Defendants regarding Plaintiffs' antitrust claims.

Pending before me now is plaintiffs' motion for or class certification.

As stated above, plaintiffs seek certification as a class representing all person who have (since January 20, 1989) received medical care or hospital services from a Pennsylvania hospital and then sought to obtain copies of their medical records. They also seek to certify defendants as a class of Pennsylvania hospitals who charged a copying fee or utilized a copy service which charged a copying fee.

In deciding the motion for class certification, the court is confronted again with the same fundamental problem which spelled doom for plaintiffs' antitrust claims: plaintiffs are not merely persons who sought to obtain their hospital records by filling out a consent form and paying, or refusing to pay, an exorbitant fee charged by defendants. Plaintiffs are persons who sought their hospital records because they had underlying personal injury or malpractice lawsuits which made the acquisition of their medical records a necessity. Therefore, the allegedly exorbitant copying fees which are the most basic issue in this lawsuit were never paid by any of the purported class plaintiffs, and counsel for plaintiffs have acknowledged that plaintiffs will never have to pay copying charges, absent a recovery in their underlying lawsuit. I must agree with defendants' characterization of plaintiffs as 'contingent reimbursers." But however plaintiffs are characterized, they cannot be considered adequate class representatives, and therefore, plaintiffs' motion for class certification must be denied.

The question of who actually paid the money to get the records is not the only flaw in plaintiffs' attempt to gain class certification. Just as significant is the fact, as some of plaintiffs' deposition testimony establishes, that most of the purported class representatives know little or nothing about copy charges because those charges were paid by their attorneys. Their only knowledge of the issue came from what their attorneys told them about it, which was generally t hat the copy charges their attorneys had to pay to get their medical records were too high. I found previously that plaintiffs could not be considered the "direct purchasers" of the copies of their medical records, which negated their antitrust claims. I have also reached the conclusion that plaintiffs lack

standing to raise the issues this purported class action seeks to raise.

The pre-requisites for class certification-- numerosity, commonality, typicality, and adequacy-- have become a familiar litany in class action cases and I have no doubt that the parties to this lawsuit do not require any additional exposition on those points in this memorandum. Because I have found that plaintiffs cannot meet the "adequacy" requirements for class representation under Rule 23, I will deny their motion for class certification of a defendant class as well.

Therefore, I am entering the following Order:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY RUTH MCCARTHY, GUY COLVILLE, EDWARD ORMSBY, CARMEN TOMASETTI, and JOSEPH HOFFMAN,	:	Civil Action
	:	No. 92-281
Plaintiffs,	:	
v.	:	
RECORDEX SERVICE, INC., COPYRIGHT, INC., SMART CORP., MEDFAX, INCORPORATED, HOSPITAL CORRESPONDENCE COPIERS, MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA MISERICORDIA HOSPITAL DIVISION, METHODIST HOSPITAL, THE GRADUATE HOSPITAL, HAHNEMANN UNIVERSITY HOSPITAL and THE LOWER BUCKS HOSPITAL,	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of November, 1994, upon consideration of plaintiffs' motion for class certification, and defendants' response, it is ORDERED that plaintiffs' motion for class certification is DENIED.

By the Court:

"s/ Robert F. Kelly, J."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY RUTH MCCARTHY, GUY COLVILLE, EDWARD ORMSBY, CARMEN TOMASETTI, and JOSEPH HOFFMAN,	:	Civil Action
	:	No. 92-281
Plaintiffs,	:	
v.	:	
RECORDEX SERVICE, INC., COPYRIGHT, INC., SMART CORP., MEDFAX, INCORPORATED, HOSPITAL CORRESPONDENCE COPIERS, MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA MISERICORDIA HOSPITAL DIVISION, METHODIST HOSPITAL, THE GRADUATE HOSPITAL, HAHNEMANN UNIVERSITY HOSPITAL and THE LOWER BUCKS HOSPITAL,	:	
Defendants.		

MEMORANDUM

R.F. KELLY, J. DECEMBER 29, 1994

I have made two previous rulings in this case. On July 8, 1994, I granted defendants' motion for partial summary judgment on plaintiffs' antitrust claims. On November 18, 1994, I denied plaintiffs' motion for class certification.

The basis for both of these rulings was my finding that plaintiffs could not be considered the direct purchasers of the copies of medical records which are the subject of this proposed class action lawsuit. Because they were not direct purchasers, they could not

maintain an action under the Sherman Antitrust Act, 15 U.S.C. § 1 et seq., nor could they could be adequate class representatives to assert the claims they proposed to assert . Both sides now agree that this finding is decisive in connection with plaintiffs' remaining count, which is a claim under the Racketeering Influenced and Corrupt Organizations Act. ("RICO") 18 U.S.C. § 1961 et seq.

In Holmes v. Securities Investor Protection Corporation, 112 S.Ct. 1311, (1992), the Supreme Court stated that a plaintiff's right to sue under § 1964 of the RICO was predicated on the same "proximate cause" standard required under the Clayton and Sherman Acts. Justice Souter wrote that "directness of the relationship is not the sole requirement of Clayton Act causation [but] it has been one of its central elements." 112 S.Ct. At 1318.

Plaintiffs have conceded that if "the underlying rationale" used by the Court in granting summary judgment on the plaintiffs' antitrust claims and in denying plaintiffs' class certification motion is correct, it 'logically follows' that summary judgment should be granted in favor of defendants on plaintiffs' RICO claims as well. I agree. I am therefore entering the following Order:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY RUTH MCCARTHY, GUY COLVILLE, EDWARD ORMSBY, CARMEN TOMASETTI, and JOSEPH HOFFMAN,	:	Civil Action
	:	No. 92-281
Plaintiffs,	:	
v.	:	
RECORDEX SERVICE, INC., COPYRIGHT, INC., SMART CORP., MEDFAX, INCORPORATED, HOSPITAL CORRESPONDENCE COPIERS, MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA MISERICORDIA HOSPITAL DIVISION, METHODIST HOSPITAL, THE GRADUATE HOSPITAL, HAHNEMANN UNIVERSITY HOSPITAL and THE LOWER BUCKS HOSPITAL,	:	
Defendants.	:	

ORDER

AND NOW, this 29th day of December, 1994, upon consideration of defendants' motion for summary judgment on Count II of the amended complaint, and plaintiffs' response, it is ORDERED that:

1. Summary judgment is GRANTED in favor of all defendants on Count II of plaintiffs' amended complaint.

2. Final judgment is hereby entered in favor of all defendants and against all plaintiffs on all claims asserted in the amended complaint.

3. Plaintiffs' motion to secure certification is DENIED as moot.

4. The Clerk of Court is directed to list this case as CLOSED.

By the Court:

"s/ Robert F. Kelly, J."

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

15 U.S.C.A. § 15

"§ 15. Suits by persons injured.

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for anyperiod is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to whow that such party or representative acted intentionally or delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such eprson or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providng for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instumentalties of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engaged primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section--

(1) the term 'commercial activity' shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term 'foreign state; shall have the meaning given it in section 1603(a) of Title 28.

(As amended September 19, 1980, Pub.L. 96-349, § 4(a)(1), 94 Stat. 1156; Dec. 29, 1982, Pub.L.97-393, 96 Stat. 1964.)"

"28 Pa. Code.

§ 115.27. Confidentiality of medical records.

All records shall be treated as confidential. Only authorized personnel shall have access to the records. The written authorization of the patient shall be presented and then maintained in the original record as authority for release of medical information outside the hospital.

§ 115.28 Ownership.

Medical records are the property of the hospital and they shall not be removed from the hospital premises, except for court purposes. Copies may be made available for authorized appropriate purposes such as insurance claims, and physician review, consistent with § 115.27 (relating to confidentiality of medical records).

§ 115.29. Patient access.

Patients or patient designees shall be given access to or a copy of their medical records, or both, in accordance with § 103.22(b)(15)(relating to implementation). Upon the death of a patient, the hospital shall provide, upon request, to the executor of the decedent's estate or, in the absence of an executor, the next of kin responsible for the disposition of the remains, access to all medical records of the deceased patient. The patient or the patient's next of kin may be charged for the cost of reproducing the copies; however, the charges shall be reasonably related ot the costs of making the copy.

Supreme Court, U.S.
FILED
JUL 30 1996
OFFICE OF THE CLERK

No. 95-2087

In The

Supreme Court of the United States

October Term, 1995

MARY RUTH McCARTHY, GUY COVILLE, EDWARD ORMSBY, CARMEN TOMASETTI and JOSEPH HOFFMAN,

Petitioners,

vs.

RECORDEX SERVICES, INC., COPYRIGHT, INC., SMART CORP., MEDFAX INCORPORATED, HOSPITAL CORRESPONDENCE COPIERS, INC., MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA, MISERICORDIA HOSPITAL DIVISION METHODIST HOSPITAL, THE GRADUATE HOSPITAL, HAHNEMANN UNIVERSITY HOSPITAL and THE LOWER BUCKS HOSPITAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court issue a writ of certiorari to consider Petitioners' request for creation of a special exception to the direct purchaser rule of *Illinois Brick* and *Utilicorp*, where Petitioners do not directly purchase the product at issue, and where its cost is in fact borne in part or in full by either those who do directly purchase the product or by third parties?

2. Should this Court issue a Writ of Certiorari to determine whether the Court of Appeals and the district court were both wrong in their interpretation of Pennsylvania law on the concept of agency?

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A. The Decision Below Does Not Conflict With A Decision Of This Court Or Any Court Of Appeals 3

B. The Decision Below Does Not Leave An Important Question Of Federal Law Unaddressed 3

C. The Decision Below Correctly Applies The Policy Rationales Cited By This Court In *Illinois Brick* and *Utilicorp* 4

II. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER WHETHER UNDER PENNSYLVANIA LAW THE PETITIONERS' ATTORNEYS WERE AGENTS RATHER THAN INDEPENDENT CONTRACTORS FOR THE PURPOSES OF PURCHASING MEDICAL RECORD PHOTOCOPIES 7

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15 U.S.C. § 1 et seq. 1

18 U.S.C. § 1961 et seq. 1

RESPONDENTS' BRIEF IN OPPOSITION

All Respondents jointly request that the Court deny the Petition for a Writ of Certiorari seeking review of the Third Circuit's Opinion in this case. The Opinion is reported at 80 F.3d 842 (3d Cir. 1996), and is reproduced in Petitioner's Appendix, Pet. App. at 1a-35a.

COUNTERSTATEMENT OF THE CASE

Petitioners seek review of those portions of a decision by the Third Circuit Court of Appeals denying them standing in their antitrust damages claims (15 U.S.C. § 1 et seq.) and RICO damages claims (18 U.S.C. § 1961 et seq.) against Respondents.[1] The facts surrounding this matter were developed at length in the opinion of the Third Circuit, which Respondents incorporate by reference. *See McCarthy v. Recordex Services, Inc.*, 80 F.3d at 845-46, 853-54, Pet. App. at 5a-8a, 21a.

MISSTATEMENTS OF FACT

Pursuant to Rule 15.2, Respondents wish to correct Petitioners' very significant misstatements of fact. The Petition is premised entirely on the assertion that all photocopy costs incurred by the attorneys who actually

[1] Petitioners do not seek review of the portion of the Third Circuit's opinion which reversed the district court by holding that the direct purchaser rule did not bar Petitioners from standing for the purpose of injunctive relief under Section 16 of the Clayton Act, and remanding for further consideration.

purchased the photocopies were passed through to, and fully reimbursed by, the Petitioners (Petition at 17, 19, 20), and that their attorneys were only "agents" who "temporarily advanced" funds (Petition at 12, 15). The undisputed facts, however, as reflected in the decisions of both the district court and the Court of Appeals, are that none of the direct purchaser-attorneys were entitled to *any* reimbursement from Petitioners unless a settlement or judgment were obtained in the underlying litigation; that the direct purchasers had in fact received reimbursement in the case of only two of the five Petitioners; that even where the direct purchaser-attorneys were reimbursed, the costs of such reimbursement were not necessarily borne in whole or in part by Petitioners, who under no circumstances made any out-of-pocket payments; and that economic variables and likely cost-shifting made the pass-through analysis very complex and uncertain (Pet. App. at 6a-7a, 17a-18a, 21a).

Second, contrary to the Petitioners' assertion (Petition at 6-7), the rates charged by hospitals or copy companies for record copies and associated fees are not uniform (Appellate Record Appendix at 501, 503, 507-08, 510-11, 513-16, 720-22, 737-38, 828-29, 882-84, 1058, 1066).

Third, the Petitioners mischaracterize the testimony when they claim (Pet. at 9) that "the copy service defendants conceded that a patient's hospital records could not be released to an attorney unless the patient signed a written authorization designating the attorney as the patient's authorized representative to obtain those records." The only thing "conceded" by the copy companies, and the only thing evidenced by the record, is that copies of a patient's medical records would not be

sold to anyone, including attorneys for plaintiffs or defendants, without a signed authorization by the patient (Appellate Record Appendix at 564, 566, 567, 569, 571).

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER PETITIONERS' REQUEST FOR CREATION OF A SPECIAL EXCEPTION TO THE DIRECT PURCHASER RULE OF *ILLINOIS BRICK* AND *UTILICORP*

A. The Decision Below Does Not Conflict With A Decision Of This Court Or Any Court Of Appeals

The decision of the Third Circuit explicitly applies, and follows, this Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990). The Petitioners do not even assert a conflict between the Third Circuit's decision and any Supreme Court or other Circuit Court case.

B. The Decision Below Does Not Leave An Important Question Of Federal Law Unaddressed

Citing snippets of dicta (Pet. at 16), Petitioners claim they present a question of law previously unaddressed. They urged the District Court and the Court of Appeals, and urge this Court, to carve out an exception to the direct purchaser rule of *Illinois Brick* and *Utilicorp*, claiming that one hundred percent of the costs are passed on to them and asserting that this situation was left open in *Utilicorp* (Pet. at 16).

Even if the Petitioners could show, contrary to the record, that 100% of the cost of the photocopies would be passed through to them, their argument would still fail in the light of *Utilicorp*. Kansas took the position in *Utilicorp* that all of the cost increases were passed through by the utilities to their customers. Even so, the Court denied standing to anyone other than the direct purchasers based on prior law and policy concerns. *Utilicorp* is squarely on point in this matter, and unequivocally addressed the question presented by the Petitioners.

C. The Decision Below Correctly Applies The Policy Rationales Cited By This Court In *Illinois Brick* and *Utilicorp*

The Third Circuit correctly determined, and applied, the policy rationales underlying *Illinois Brick* and *Utilicorp*. Indeed, those complicating factors are present here in even greater force; apportionment of damages here would be both highly complex and highly speculative. Both the District Court and the Court of Appeals correctly rejected the basic premise of Petitioners' argument, i.e., the contention that 100% of all overcharges are passed through to, and borne entirely by, Petitioners.

First of all, as discussed *supra*, any pass-through at all is contingent on a settlement or other recovery in the underlying litigation; the direct purchasers – the attorneys in the underlying case – thus bear the entire cost in many, if not most, cases. Second, in the face of high photocopy costs, the direct purchaser attorneys may alter their buying behavior and incur *other* never-to-be-passed-through costs. They may, for example, go on site to view

or summarize certain voluminous records personally. Third, as observed by the Court of Appeals, plaintiffs' attorneys may shift part or all of the photocopy costs incurred on behalf of losing plaintiffs, which the attorneys are not reimbursed for, to winning plaintiffs (Pet. App. at 17a-18a). Similar factors were noted by the Court in the paragraph of *Utilicorp* following the dicta cited by the Petitioners (497 U.S. at 218) as an additional reason to deny standing to the indirect purchasers even in the case of 100% cost pass-through.

Fourth, in the cases where the direct purchasers do receive some reimbursement as a result of settlement in the case they were retained to pursue, the amount of that settlement will often reflect, in part, the amount of the plaintiffs' attorneys' out-of-pocket expenses, including payments for photocopies. Even in the case of a verdict, it is the defendants' funds which are then used to cover the plaintiffs' attorneys' expenses – photocopies, airline tickets, deposition transcripts, taxi fare, etc. – before the plaintiff is paid the remainder. Accordingly, it is the settling or losing *defendant* that bears part or all of the photocopy costs.

As the foregoing begins to reveal, if the Court were to carve out an exception to the direct purchaser rule for Petitioners, the actual task of sorting out damages would be extremely complex and daunting. The trial court would have to determine in each case how much, if any, of the overcharge is absorbed by the purchaser-lawyers, how much (if any) rests with the Petitioner-plaintiffs, and how much is ultimately borne by settling or losing defendants. The difficulty in so doing here would be exponentially increased by the myriad of differing retainer

agreements, varying attorney actual practices, and the dissimilar costs of production among the separate hospitals.

Just as in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), *Illinois Brick*, and *Utilicorp*, the complexity of tracing the pass-through here dictates that the direct purchaser rule be applied without an exception. The instant case illustrates well the wisdom of the Court's admonition in *Utilicorp*:

> The rationale underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." *Illinois Brick*, 431 U.S. at 744. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. As we have stated:
>
> > "[T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' into treble-damages proceedings, albeit at a somewhat higher level of generality."
>
> *Id.* at 744-45.
>
> In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule

> might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions [to the direct purchaser rule].

497 U.S. at 216-17.

II. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER WHETHER UNDER PENNSYLVANIA LAW THE PETITIONERS' ATTORNEYS WERE AGENTS RATHER THAN INDEPENDENT CONTRACTORS FOR THE PURPOSES OF PURCHASING MEDICAL RECORDS PHOTOCOPIES

A. The Decision Below Does Not Create A Federal Common Law Standard For Determining An Agency Relationship And Does Not Involve A Question Of Federal Law In Determining Whether Plaintiffs' Attorneys Are Agents Or Independent Contractors When Purchasing Photocopies

Petitioners claim that the Third Circuit, in determining Petitioners' attorneys were not Petitioners' agents for purposes of antitrust standing, created federal common law. The only support advanced by Petitioners for this argument is that the Third Circuit noted that none of the cases cited on the agency issue directly discussed the issue in an antitrust standing context (Pet. at 21).

Petitioners' argument misses the mark. The Third Circuit was making no general federal common law pronouncement on agency law. The Third Circuit had simply noticed that the prior Pennsylvania cases dealt with whether an attorney could be personally bound to pay

litigation costs (yes: *Messenger Publishing Co. v. Walkinshaw*, 102 Pa. Super. 445 (1931); *Pessano v. Eyre*, 13 Pa. Super. 157 (1900)). Here, there is no doubt that the attorneys bound themselves to pay, and did pay. The only question is whether the fact that the attorneys bought photocopies in the course of preparing a personal injury lawsuit conferred antitrust standing on their clients.

Petitioners argued below that determination of the issue required examination of *Pennsylvania* law regarding agency versus independent contractorship. The district court and Third Circuit then interpreted Pennsylvania law, albeit contrary to the way Petitioners argued. No "disrupt[ion of] commercial relationships predicated on state law" (Pet. at 21, 22 (citations omitted)) is even articulated by Petitioners, let alone threatened. That the Petitioners disagree with the district court and the Third Circuit in those courts' considered determination and application of state law does not raise a *federal* question of sufficient importance and magnitude as to warrant granting a writ of certiorari. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). The question of whether Petitioners' attorneys were merely Petitioners' agents, or were independent contractors, is a question of local law interpretation in which the Court should defer to the expertise of the Third Circuit. *See Butner v. United States*, 440 U.S. 48, 57-58 (1979) (deferred to Court of Appeals on questions of local law); *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976) (same) (citations omitted).

B. The Court of Appeals' Resolution Of The Agency Issue Was Correct

The courts below properly found Petitioners' attorneys to be independent contractors – not mere purchasing agents – under state law agency principles for the purpose of purchasing photocopies. The Petitioners hired the attorneys on a contingent fee basis, to pursue personal injury or medical malpractice actions, not at a flat fee as purchasing agents. The attorneys purchased the records in their own judgment for their own use, not at the clients' direction or for the clients' use. The attorneys controlled how the job (prosecuting the lawsuit) was performed, retaining exclusive control of the manner of performance. Finally, if the attorneys were to be reimbursed at all for the photocopies, such reimbursement would occur only if the attorneys obtained a recovery in the underlying claim (Pet. App. at 18a-22a). The District Court and the Third Circuit Court of Appeals were quite correct in distinguishing this situation from that presented by a true purchasing agent. Pet. App. at 19a; *see In Re Toilet Seat Antitrust Litigation*, 387 F.Supp. 1342 (E.D. Mich. 1977); *cf. Illinois Brick*, 431 U.S. at 736 n.16.

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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Respectfully submitted:

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